(1) Supreme Court, U.S.
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01-370 AUG 29 2001

NO. ——— OFFICE OF THE CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM 2001

JASON RICHARDS and JEFFREY TERRELL,
Petitioners,

v.

JEFFERSON COUNTY, ALABAMA
and BIRMINGHAM-JEFFERSON CIVIC
CENTER AUTHORITY,
Respondents.

PETITION FOR WRIT OF CERTIORARI, OR ALTERNATIVELY, TO REINSTATE THE WRIT PREVIOUSLY GRANTED TO THE SUPREME COURT OF ALABAMA

BRIEF OF PETITIONERS

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102 pp

QUESTIONS PRESENTED FOR REVIEW

I.

Does the convoluted exemption scheme described by Alabama Chief Justice Moore's dissenting opinion below as creating "an unusually diverse class of exempt citizens, including lawyers, doctors, magicians, astrologers, and operators of hot dog stands" and by Associate Justice Johnstone as a scheme which "exempts a hodgepodge of categories of taxpayers while it does not exempt other virtually indistinguishable categories of taxpayers" warrant reversal of the Alabama Supreme Court's split decision in the case at bar, on federal equal protection grounds?

We contend that it does. This Court granted the writ on this issue in this case before, along with a *res judicata* issue which it decided in favor of petitioners here. *Richards v. Jefferson County,* 517 U.S. 793 (1996). But after granting the writ, this Court determined that neither the trial court nor the Alabama Supreme Court had addressed the merits of the equal protection claim and, on that basis, dismissed the writ as to this issue. *Richards,* 516 U.S. 1167 (1996). It is an issue that has now been decided, adversely to petitioners, by the Alabama Supreme Court. It is ripe for this Court's review, and this Court's decision in *Jefferson County v. Acker,* 527 U.S. 423 (1999) makes it clear that the Alabama Supreme Court's "business license" analysis below is flawed. This Court, in *Acker, supra,* found this tax to be an income tax, not a license tax. The lucky, who are exempt from paying this tax, are familiar to this Court by a list which appears in Justices Breyer's and O'Connor's appendix to *Acker, supra.*

II.

Does Jefferson County's peculiar enforcement of the same exemption scheme violate the equal protection clause of the Fourteenth Amendment, and does the Alabama Supreme Court decision below err in its application of federal law to the uncontradicted evidence?

We contend they do. The only member of the Jefferson County Commission participating in enactment of the tax in issue gave uncontradicted testimony that "at the time we considered the passage of the occupational tax, it was clearly irrational" and the record on appeal confirms this testimony. Preachers are not mentioned in the exemption scheme, or anywhere else, but, by fiat, those who are "ordained" ministers are exempt, and those who are not "ordained" are not. Some lawyers "not practicing law" are allowed an exemption on that basis (corporate "house counsel", for example) while others "not practicing law" are taxed (federal and state court judges, for example). Finally, many "licensed professionals" have been lumped in, for no good reason, with the average working men and women who pay the tax. Jefferson County's failure to exempt from its tax these "licensed" taxpayers is arbitrary, irrational and inexplicable. It has offered no rational explanation for these anomalies, in the record or otherwise. None exists.

III.

Does the conflict between the Alabama Supreme Court's decision here in issue and this Court's decision in *Acker, supra,* and its equal protection "rationality test" decisions cited below warrant a grant of the writ, and its reversal?

We contend that it does. These decisions speak for themselves.

CERTIFICATE OF INTERESTED PERSONS

Respondents' Counsel	Edwin A. Strickland Charles S. Wagner Jeffrey M. Sewell William Slaughter Charlie D. Waldrep Thomas L. Stewart
Petitioners' Counsel	William J. Baxley Joel E. Dillard
Respondents	Jefferson County, Alabama Birmingham-Jefferson Civic Center Authority
Trial Judge	Hon. John Rochester
Petitioners	Jason Richards Jeffrey Terrell and a class of similarly situated persons
Supreme Court of Alabama	Hon. Roy Moore (dissenting) Hon. J. Gorman Houston Hon. Jean Brown Hon. Champ Lyons, Jr. Hon. Bernard Harwood Hon. Lynn Stuart Hon. Douglas Johnstone (dissenting) Hon. Tom Woodall (recused) Hon. Harold See (recused)

No other persons are known to have participated directly in the appeal of this matter. Indirect participants in the appeal of this matter, due to consolidation of several appeals with the case at bar in the Alabama Supreme Court, Case Nos. 1990836, 1990923 and 1990961, are:

Plaintiff/Appellant	Phillip A. Triantos, M.D.
Counsel for Plaintiff/Appellant	E. Clayton Lowe, Jr. Wilson F. Green

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STATEMENT OF GROUNDS OF JURISDICTION

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1257 because this Petition is from a decision of the Supreme Court of Alabama in a civil case, and involves a federal constitutional question incorrectly decided by that Court.

(i) Date of the decision: June 22, 2001

(ii) No Application for Rehearing

(iii) No cross petition filed

(iv) Jurisdiction is based on 28 U.S.C. § 1257(1) and Rule 10.1(c) of the Rules of the Supreme Court.

(v) The Fourteenth Amendment to the *Constitution of the United States*, Section 1, provides in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

(I) Nature of Case, Course of Proceedings and Disposition

On April 21, 1992, Jason Richards and Fannie Hill filed a class action complaint in state court, attacking the exemption scheme built into Jefferson County, Alabama's occupational tax. They claimed it denied them due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, and under parallel provisions of the Constitution of Alabama. [Seven years later, in an unusual but decidedly local ruling, the Alabama Supreme

Court abolished the equal protection guaranty which it had recognized for decades to be part of the Alabama Constitution of 1901. *Ex Parte Melof,* 735 So.2d 1172 (Ala. 1999), *cert. den.* 528 U.S. 986 (1999)]

A motion for summary judgment, based upon a defense of *res judicata,* claimed to obtain as a result of a decision by the Alabama Supreme Court, *Bedingfield v. Jefferson County,* 527 So.2d 270 (Ala. 1988), was filed in the trial court on June 4, 1992.

On April 8, 1993, Jefferson County was granted summary judgment upon all state law claims, but summary judgment was denied as to petitioners' federal constitutional claims. (R. 392-394) Jefferson County and an intervenor tax recipient, Birmingham-Jefferson Civic Center Authority, appealed the trial court's denial of summary judgment upon these federal constitutional claims to the Alabama Supreme Court. (R. 425-428).

The Alabama Supreme Court reversed the trial court on this *res judicata* issue on March 31, 1995, and overruled petitioners' application for rehearing on June 9, 1995. *Jefferson County v. Richards,* 662 So.2d 1127 (Ala. 1995).

This Court granted certiorari on the *res judicata* issue, and also on the exact equal protection issue which is now embraced by this petition. *Richards,* 516 U.S. 983 (1995). But before oral argument, this Court determined that neither the trial court nor the Alabama Supreme Court had opportunities to address the merits of petitioners' equal protection claims, and on that basis dismissed the writ as improvidently granted. *Richards,* 516 U.S. 1167 (1996). This Court then reversed the Alabama Supreme Court's decision, *Richards,* 517 U.S. 793 (1996), and remanded the action for a trial on the merits of petitioners' federal equal protection claims.

On remand, the trial court entered an order certifying the *Richards* class on May 14, 1997 (R. 467-469) and, after

a trial, entered a declaratory judgment on November 12, 1998. The trial court held that the tax scheme here violates the United States Constitution because it contains exemptions which are "unfair, arbitrary and irrational" and because "it violates the rights of wage earners and certain select professionals by unfairly subjecting them to an employment tax while allowing other occupations to be exempt from the tax by paying a nominal yearly license fee." (R. 493-495) The same judgment also held that "the ordinance and statute in question each contain vague definitions which led to subjective interpretations and inconsistent enforcement of the tax." (R. 493-495)

Jefferson County perfected an appeal, and on June 22, 2001, the Alabama Supreme Court reversed the trial court, and held that the offending exemption scheme now before this Court passed federal constitutional muster. In doing so, the Alabama Supreme Court rejected this Court's factual interpretation of the same tax and exemption scheme set forth in *Jefferson County v. Acker,* supra. (This court held, in *Acker, supra* that: "In practice, Jefferson County's license tax serves a revenue-raising, not a regulatory purpose. Jefferson County neither issues licenses to taxpayers, nor in any way regulates them in the performance of their duties based on their status as license taxpayers." 527 U.S. at 440.)

This petition seeks review and reversal of the Alabama Supreme Court's most recent decision. [See *Richards,* 662 So.2d 1127 (Ala. 1995); 682 So.2d 409 (Ala. 1996); 710 So.2d 908 (Ala. 1998); 767 So.2d 343 (Ala. 2000)]

(II) Statement of Facts with References to Record

The county taxing ordinance appears in the appendix and the record (R. 30-31). It is necessary to refer to the

Code of Alabama, cited within it, to locate the list of persons and businesses which are exempt from the tax, but they are conveniently collected not only in Justice Maddox's dissenting opinion in the Alabama Supreme Court decision this Court reversed in 1995 [*Richards v. Jefferson County,* 662 So.2d 1127 (Ala. 1995), at Footnote 1] but also in Justices Breyer's and O'Connor's 1999 Appendix to *Acker,* 527 U.S. at 423.

In 1992 Jason Richards, a law firm courier, and Fannie Hill (who was replaced by Jeffrey Terrell), together represented a class of claimants attacking the Jefferson County Occupational Tax's exemption scheme. Their complaint appears in the appendix and the record on appeal. (R. 1-18). They made a specific claim that "this action involves a violation of federal law for which 42 U.S.C. § 1983 provides a remedy" (R. 2) and alleged that "[t]he occupational tax by its terms, and in actual practice, exempts from its levy, collection and payment businesses and vocations or occupations listed at Chapter 12, Article 2, Title 40, Code of Ala. 1975, as amended, which range from attorneys, certified public accountants, dentists and physicians to blueprint makers, casket manufacturers, pig iron storage operators, lightning rod installers and snuff retailers, and it includes a specific exemption for domestic servants in private homes." (R. 8) A complete and staggering list of exempted callings appears in the text of argument below. Richards and Hill complained that "[b]y its terms and in actual practice, it taxes all federal employees, including all United States District Judges in the Northern District of Alabama, all Circuit, District and Probate Judges in Jefferson County, and an array of other occupations, including couriers, secretaries, skilled and unskilled laborers, police officers, business executives, teachers and domestic servants not employed in private homes." (R. 8) Richards and Hill also complained that "the net effect, dollarwise, of the

occupational tax is an absurdity which allows, by way of example, physicians and attorneys earning hundreds of thousands of dollars a year to pay a license fee of $150.00 or less and avoid the occupational tax — which would otherwise be levied at more than ten times the amount of the license fee paid by these high income professionals" (R. 9) and concluded that "[t]he array of persons subject to the tax, on its face and in actual practice, is arbitrary and capricious, and discriminatory in a manner which defies logic and . . . [t]he array of persons subject to the occupational tax, and the concomitant disparity in taxes paid by and between occupations in Jefferson County, Alabama which fall within and without the burden of the occupational tax render it irrational, unduly burdensome, and violative of the equal protection clause and the due process clause of the Fourteenth Amendment to the Constitution of the United States." (R. 9) Finally, they claimed that "the occupational tax is so arbitrary and irrational, as described herein, as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States, both on its face and in its application to both classes of taxpayers bringing this action." (R. 14).

At trial, it was established, without contradiction, that when Jefferson County enacted its occupational tax, it did so with the inclusion of "loopholes" for a "sizeable number of professions, with no apparent rationale." (Tr. 32) The only commissioner available at trial who was present when the tax was enacted testified: "I would have had a hard time determining what sleight of hand artists, psychic healers, playing card salesmen and lawyers have in common. There is no rationale." (Tr. 39)

The County's Director of Revenue admitted, when called as a hostile witness, that the $10 annual fee embalmers pay to avoid the tax does not go to, or benefit, Jefferson County. (Tr. 46) He also admitted that fire-

works dealers pay nothing to Jefferson County and are completely exempt from paying its occupational tax. (Tr. 47) Fortune tellers, clairvoyants, astrologers, crystal ball gazers, and junk yard operators pay nothing to the county and are completely exempt. (Tr. 48-49) He characterized a group of sole proprietors whose businesses are incorporated as falling within a "taxed twice" group which he considers to be "a peculiar thing". (Tr. 53) Real estate salesmen and insurance agents pay no license fee to the state or the county, but are also strangely exempt from paying the occupational tax. (Tr. 56) Similarly, he admitted that accountants, lawyers, dentists, and engineers pay nothing to the county and enjoy complete exemptions. (Tr. 61-62) Another group of professionals — dental hygienists, electrical contractors, nurses, and psychologists pay state license fees but are strangely required to pay the occupational tax, as well. (Tr. 64-67) "Preachers and ministers" are nowhere mentioned in the occupational tax or its exemption scheme, but the county has decided to exempt them nevertheless, if they are "ordained" but not otherwise. (Tr. 80) He admitted sharp income disparities by and between dentists, who are exempt, and their hygienists, who are not (Tr. 85), and that before this suit was filed the County erroneously "exempted" security guards and barbers who, like ministers, are not mentioned in the exemption scheme. (Tr. 92)

Nurses testified, and their licenses were introduced into evidence, along with proof that they pay the occupational tax. (Tr. 98-112) A geologist did likewise. (Tr. 115-124) Investment brokers, administrative officers, teachers, police officers, and real estate appraisers gave similar testimony about the ways in which they were considered professionals or paid actual license fees to the state, but were somehow left out of the group which enjoys total exemption. (Tr. 128-191)

The current President of the Jefferson County Commission testified: "The only reason we're being sued is the inequality of the tax . . . we can't do without the tax now and the only options are to do away with it or make it fair. As far as the Commission is concerned, that's our only two options, since we can't change the law." (Tr. 217-222) She concluded her testimony on this note: "It is my hope that the Legislature will apply the law equally — the tax equally to everybody." (Tr. 241)

For the county Dr. Ira Harvey, a history professor, gave testimony tracing the history of taxation in Alabama, then conceded, with respect to the Jefferson County Occupational tax: "I am not offering testimony on this particular tax today." (Tr. 364) One important colloquy involving this history expert's testimony warrants inclusion here:

> Q: So you've got no opinion then that you're offering about the rationality or the rational basis for the Jefferson County Occupational tax or the license code of Jefferson?
>
> A: No. (Tr. 367)

No expert witness testified that the county's exemption scheme was rational. But it's irrationality was addressed by the State Medical Examiner Board Director, who admitted that no fees paid to his agency go to the county (Tr. 383), and by the State Real Estate Commission Director, who admitted that none of his agency's fees go to the county.

The county's chief financial officer testified that Jefferson County pays $10,000,000 annually to the Birmingham-Jefferson Civic Center, a party intervening in this action. (Tr. 409) He also testified that the County had enough money left over after these payments to buy a $50,000,000 private hotel. Tr. (415) The county's finance director testified at length about his job and the

records he keeps, and was cross-examined at length about the county's financial health — testimony which may be relevant at some point to a remedy phase of this action, but is not germane to the issues now before this Court. (Tr. 459-551) The county attorney gave an opinion that the purpose of the tax is to raise revenue and exercise police power. (Tr. 554) He admitted that many ministers simply quit paying the occupational tax after doing so for years, and that the county did nothing to attempt to enforce the tax against them on "complicated legal uncertainty" grounds. (Tr. 578) He described his decision to apply the tax to Judges Acker and Clemon (and the rest of their brothers and sisters on the bench) of the United States District Court for the Northern District of Alabama as having been made on a "fish or cut bait" basis because they do not "practice law." (Tr. 580) But corporate "house counsel" who do not practice law are inexplicably allowed to evade the tax. (R. 598-601) The County offers no coherent explanation for this disparity. (R. 598-601)

ARGUMENT

(I) Scope of Review

Richards and Terrell, who are not members of a suspect or quasi-suspect class, must establish that the exemption scheme attacked here as violative of the Fourteenth Amendment fails this Honorable Court's "minimum rationality" test for tax exemption. *Hooper v. Bernalillo County Assessor,* 472 U.S. 612 (1985).

(II) Amplification of Reasons for Allowance of Writ

The Irrational Exemption Scheme In Issue Here Is Unconstitutional On Its Face

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall deny to any

person within its jurisdiction the equal protection of the laws. *Nordlinger v. Hahn*, 505 U.S. 1 (1992). And while the Equal Protection Clause does not forbid reasonable classifications, it does keep governmental decisionmakers from treating differently persons who are in all relevant respects alike. *F. S. Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920), *Plyler v. Doe*, 457 U.S. 202 (1982), *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). And even where — as here — persons discriminated against do not fall in a suspect or quasi-suspect classification, the Equal Protection Clause forbids irrational means to serve legitimate ends. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442 (1985).

This Honorable Court tersely summarized application of the Fourteenth Amendment to the case at bar in the *F. S. Guano case, supra:*

> But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

253 U.S. at 412.

This rationality test has been held to specifically apply to tax exemption schemes. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985). It also applies, of course, to other taxation disparities which are irrational and arbitrary. *Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266 (1936); *Sioux City Bridge Co. v. Dakota County, Nebraska*, 260 U.S. 441 (1923). See also, *Sunday Lake Iron Co. v. Wakefield Township*, 247 U.S. 350 (1918).

By this petition, we respectfully invite this Honorable Court to revisit its decisions forbidding discriminations arbitrarily and irrationally imposed upon Vietnam War veterans who were newcomers to a state, when none were

suffered by their more tenured counterparts, *Hooper, supra;* forbidding application of arbitrary distinctions to recent real property purchasers, because the same distinctions were not applied to others who managed to hold onto real property for a while longer, *Allegheny Pittsburgh Coal Company, Inc. v. County Commission of Webster County, West Virginia,* 488 U.S. 336 (1989); forbidding unequal application of zoning laws to disabled group home residents, when their better advantaged neighbors evaded them, *Cleburne, supra;* rejecting Alabama's attempt to impose higher rates of taxation upon foreign corporations than were imposed upon their domestic counterparts, *Metropolitan Life Insurance Co. v. Ward,* 470 U.S. 869 (1984); striking down irrational and wholly arbitrary discriminations in water supply easement ordinances, *Village of Willowbrook, supra;* and striking down discriminations against recently arriving Alaskans seeking state oil reserve dividend distributions, where their neighbors with longer periods of residency were treated more favorably, *Zobel v. Williams,* 457 U.S. 55 (1982). See also, *WHYY v. Borough of Glassboro,* 393 U.S. 17 (1968). We then petition it to grant a writ of certiorari, and declare that Jefferson County's convoluted, nonsensical, cockamamie exemption scheme cannot stand. It is a bizarre scheme which is set forth in Justice Breyer's and Justice O'Connor's opinion in *Jefferson County v. Acker, supra.* It completely exempts:

> utility companies; freight lines and equipment companies; electric companies; gas companies; railroads; telephone companies; telegraph companies; express companies; financial institutions; insurance companies; abstract companies; acetylene gas and carbide manufacturers; adding machine, calculating machine and comptrometer businesses; advertising companies; air conditioning plant and equipment businesses; amusement parks; architects; attorneys; auction-

eers; automobile dealers; automobile accessory dealers; automobile garages and shops; automobile storage garages; tire retreading shops; barbers; baseball parks; battery shops; beauty parlors; bicycle and motorcycle dealers; blueprint makers; bond makers; bottlers; bowling alleys; iron, railway supply, furnace supply and mining supply brokers and agents; broom, brush and mop manufacturers; cereal and soft drink retailers and wholesalers; certified public accountants; cigar, cigarette and cheroot retailers and wholesalers; circus operators; cleaning and pressing establishments; coal and coke dealers; coffin and casket manufacturers, dealers and agents; collection agencies; commission merchants or merchandise brokers; concert and musical entertainers; persons engaged in discounting notes, mortgages and conditional sales contracts; construction companies or contractors; cotton buyers; cotton compress operators; millers; persons operating cotton warehouses; credit agency personnel; persons operating creosoting businesses; delicatessen shops; dentists; detectives; film developers and printers; directory printers; refrigerator dealers; embalmers; engineers; owners and operators of fertilizer factories; damaged and close out goods salesmen; fireworks dealers; fortune-tellers, palmists, clairvoyants, astrologers, phrenologists and crystal gazers; fruit dealers; gasoline station and pump operators; glass salesmen; golf course operators; hat cleaners; fur dealers; horse, rodeo, dog and pony show operators; horse and mule dealers; ice cream manufacturers; innkeepers; junk dealers; launderers; sleight-of-hand artists; lightning rod installers; lumber dealers and jobbers; lumberyard operators; machinery repair shops; manicurists; hairdressers; upholsterers; doctors, chemists,

bacteriologists, and roentgenologists; persons engaged in the photocopy business; miners; monument and tombstone sellers; motion picture operators; oculists, optometrists and opticians; osteopaths and chiropractors; operators of packing houses and cold storage plants; pawnbrokers; peddlers and itinerant vendors; photographers; musical instrument salesmen; pig iron storage operators; pistol and knife dealers; playing card salesmen; plumbers, steamfitters and tin shop operators; pool halls, owners of racetracks and athletic fields; radio salesmen; real estate brokers and agents; restaurant, cafe and cafeteria operators; roadhouses, nightclubs and public dance halls; sandwich shops, barbecue stands, hamburger and hot dog stands; sawmills; scientists, naturopaths and chiropodists; sewing machine salesmen; shooting gallery operators; shotgun and rifle dealers; skating rink operators; soliciting brokers; stock and bond brokers; street fair and carnival operators; syrup and sugar factory operators; theater, vaudeville and variety show operators; ticket scalpers; tourist camp operators; tractor, road machinery and trailer dealers; trading stamp merchants; freight carriers; transient dealers, vendors and peddlers; turpentine stillers; vending machine operators; veterinarians; warehouse operators; wax factory operators and waste grease and animal by-product purchasers and receivers (See Code of Alabama 1975, Legislative Manuscript Volume 6, Title 40, Chapter 12 and Ordinance 1120 at R. 33).

Meanwhile, Jefferson County levies its tax upon average wage earners, laborers and all other persons who are not included in the above captioned list, many of whom pay license fees but were omitted — without explanation or rationale — from its list of exemptees. The exempt pay

paltry license fees (for example, five dollars for manicurists and twenty five dollars for neurosurgeons), by and large, to dodge the occupational tax altogether. But some star crossed callings and professions (nurses, geologists, investment brokers, teachers and real estate appraisers) pay state license fees but are required to pay the occupational tax, as well, because they were somehow omitted from the favored list. We respectfully submit that it is impossible for Jefferson County or for the State of Alabama to articulate a rational basis for exempting doctors and lightning rod installers, dentists and fortune tellers, attorneys and crystal ball gazers, and neurosurgeons and dog and pony show operators, to name but a few, from a substantial occupational tax while imposing the same tax on working stiffs like Richards and Terrell, and upon the licensed callings and professions that somehow didn't make the list. And no preachers have any rational basis for evading taxation, whether ordained or not, but some do. Preachers who don't evade this tax are discriminated against on an "ordination" basis which Jefferson County has established on a completely arbitrary and irrational basis.

This exemption scheme could not be more irrational or arbitrary if it also exempted left handed men with freckles or green eyed women who refuse to eat broccoli. It goes far beyond the irrationality bounds this Honorable Court declared to be the line of demarcation between constitutional and unconstitutional classification in *F. S. Guano, Allegheny Pittsburgh, Cleburne, Hooper, Metropolitan Life, WHYY, Village of Willowbrook, Sioux City Bridge Company, Mayflower Farms* and *Zobel, supra.* Chief Justice Moore of the Alabama Supreme Court and Associate Justice Johnstone were right to condemn it as violative of the United States Constitution. Without this Court's intervention, their enlightened views will, for all practical purposes, be buried with the petitioners claims.

Jefferson County's Enforcement of the Tax is Unconstitutional

If Jefferson County could do the impossible, and articulate a rational basis for its exemption of the odd group it has chosen to evade taxation, its enforcement of the tax would nevertheless violate the equal protection clause. This Court addressed the gravity of the County's "ordained" minister problem (How does a Muslim cleric or a tent evangelist obtain ordination? Jefferson County doesn't have a clue), its "practicing law" problem (How can the county attorney maintain a straight face claiming that corporate house counsel who are not "practicing law" are different from the federal judges, who do not practice law, but whom he refuses to exempt? He cannot.), and its business license distinction without a difference problem (How are nurses and geologists, who pay the same license fees to the state that others who are exempt pay, different in any rational way from them? They are not.) recently, per curiam, in *Village of Willowbrook, supra:*

> [W]e have explained that "[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute *or by its improper execution through duly constituted agents."* (Citations omitted, emphasis supplied).

528 U.S. at 564

The Alabama Supreme Court Cannot Overrule This Court's Decistion in Acker, Supra.

Undeterred by this Court's clear ruling, in *Acker, supra,* that for federal law analysis the tax here in issue is an income tax and not a business license tax, a majority of the Alabama Supreme Court elected to treat it as a business

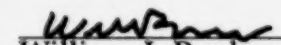
license tax anyway, and to ignore Jefferson County's improper execution — through its constituted agents — of its power to tax and its power to exempt from taxation. In doing so, this majority of the Alabama Supreme Court overruled, *sub silentio,* this Court's decision in *Acker, supra.*

CONCLUSION

This Court has already considered Jefferson County's occupational tax more than once. In 1996 in *Richards, supra,* this Court granted the petition for certiorari filed by these very same petitioners challenging this very same ordinance for its unequal, irrational and unconstitutional exemption scheme. At that time, this Court quite properly decided not to consider the apparent equal protection violation in order to defer to the Supreme Court of Alabama and to give it the opportunity to speak first on the subject. But, before the Supreme Court of Alabama got around to speaking, this Court, in 1999 in *Acker, supra,* looked again at the ordinance. There, this Court, if it did nothing else, made it plain that for the purposes of federal constitutional analysis, Jefferson County's ordinance is an income tax, albeit a very strange one. This Court said absolutely nothing to suggest to the Supreme Court of Alabama or to Jefferson County that this bizarre ordinance, for the purposes of an examination under the Equal Protection Clause, is nothing but a licensing scheme that, with impunity, can discriminate between vocations on the basis of some intuited public policy favoring certain vocations over others. When the Supreme Court of Alabama finally got around to addressing the equal protection question, five of its justices looked for a way to escape the inevitable glare of the Equal Protection Clause and of this Court. Petitioners respectfully suggest that now is the time for this Court to

put Jefferson County's fatally flawed ordinance beyond resurrection with a dispositive ruling that cannot be misunderstood or ignored. The constitutional issue that was rightfully postponed in 1996 is now overripe.

Respectfully submitted,



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APPENDIX

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2000-2001

1981680

Jefferson County and Birmingham-Jefferson Civic Center Authority

v.

Jason Richards et al.

Appeal from Jefferson Circuit Court
(CV-92-3191)

1990836

Jefferson County

v.

Phillip A. Triantos, M.D.

Appeal from Jefferson Circuit Court
(CV-99-4812)

1990923

Jason Richards and Jeffrey Terrell

v.

Phillip A. Triantos, M.D.

Appeal from Jefferson Circuit Court
(CV-99-4812)

1990961

Phillip A. Triantos, on behalf of himself
and a certified class of persons

v.

Jefferson County, Alabama

Appeal from Jefferson Circuit Court
(CV-99-4812)

PER CURIAM.

These appeals arise from, or are related to, a class action filed against Jefferson County by certain county taxpayers, referred to herein as the *Richards* class. The *Richards* class members claim that an occupational tax, as currently authorized by Ala. Acts 1967, Act. No. 406 (Reg. Session) (not codified), and implemented by Jefferson County Ordinance No. 1120, violates the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States. The equal-protection claim asserted by the *Richards* class stems from the fact that another group of taxpayers, referred to herein as the

Triantos class, or the "exempt" class, are exempt from payment of the tax, under the mandate of Act No. 406 and under the express language of Ordinance No. 1120.

The overarching issue presented in this group of appeals is whether the Equal Protection Clause of the Fourteenth Amendment mandates that all professions and occupations be treated the same by the State of Alabama and by Jefferson County for occupational-tax purposes. Stated more specifically, the primary issue presented is whether the exemptions from Jefferson County's occupational tax, granted to certain professions and occupations by Act 406 and implemented by Ordinance No. 1120, violate the Equal Protection Clause. We hold that the *Richards* plaintiffs have failed to meet their burden of proving that the exempt classifications at issue violate the Equal Protection Clause.

CASE NO. 1981680

The plaintiff class in *Richards v. Jefferson County et al.* (Case No. 1981680), filed their action in 1992, seeking a judgment declaring Jefferson County's occupational tax unconstitutional. Judge John E. Rochester entered a judgment on November 12, 1998, holding that the exemptions required by § 4 of Act 406 and allowed by Section 1(B) of Ordinance No. 1120 violate the Equal Protection Clause. On June 17, 1999, Judge Rochester entered an order enjoining the County from continuing to collect the occupational tax from the members of the *Richards* class unless it also collected the tax from the members of the *Triantos* class. Pursuant to that order, Jefferson County began collecting tax from the *Triantos* class members; also pursuant to Judge Rochester's order, the County placed those newly collected funds in a special escrow account. Jefferson County appeals from Judge Rochester's order of June 17, 1999.

CASE NO. 1990836

Case No. 1990836, an appeal styled *Jefferson County v. Phillip Triantos, M.D.*, arises out of a class action filed by a Birmingham physician, Dr. Phillip Triantos, against Jefferson County after the County had begun collecting the occupational tax from the exempt taxpayers. Triantos sought a judgment declaring that Jefferson County had no authority to impose the occupational tax on the exempt taxpayers and an injunction prohibiting Jefferson County from collecting the occupational tax from the exempt taxpayers; he also sought a refund of all occupational taxes that had been collected from the exempt taxpayers.[1] Judge Thomas Woodall (who is now a Justice on this Court) heard the action and issued the requested declaratory judgment and the requested injunction, finding no lawful basis under which the County could impose the occupational tax on the members of the *Triantos* class because the 1967 Act conferred no such taxing authority on Jefferson County.[2]

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[1]This issue gave rise to a separate appeal that is addressed later in this opinion, under the heading "Case No. 1990961."

[2]In 1999, the Legislature purported to repeal Act No. 406 (1967) by adopting Act No. 99-406 and Act No. 990-669. However, Act No. 99-406 was declared unconstitutional by Judge Woodall in *Triantos v. Jefferson County*. Act No. 99-669 was declared invalid in *Jefferson County Employees' Association et al. v. Jefferson County, Alabama et al.* (CV-00-0297), by Circuit Judge William A. Jackson. These issues are not before this Court in these appeals.

In the Regular Session for the year 2000, the Legislature again purported to repeal Act No. 406 (1967). It enacted Act No. 2000-215 to provide for a new occupational tax in Jefferson County. However, in yet another legal challenge to the constitutionality of Jefferson County's occupational tax, Judge Woodall declared Act No. 2000-215 invalid because of legislative procedural deficiencies. *See Izzi v. Jefferson State Cmty Coll. et al.* (CV-00-1768). Appeals from this litigation are pending before this Court as Case No. 1000150 and Case No. 1992027.

Jefferson County filed a "Motion to Alter, Amend or Stay," seeking a stay of Judge Woodall's injunction pending on appeal. Although Judge Woodall denied the motion, this Court, on March 22, 2000, granted the stay. By virtue of this stay, Jefferson County continues to collect the occupational tax from both the *Richards* class and the Triantos class of taxpayers.

CASE NO. 1990923

Case No. 1990923 arises out of a motion to intervene filed by the *Richards* plaintiffs in the *Triantos* action. The *Richards* plaintiffs sought to intervene in order to have the 1967 Act and the Ordinance declared unconstitutional, a position contrary to that being asserted by the exempt taxpayers in the Triantos action. Judge Woodall denied this motion, and the Richards plaintiffs appeal.

CASE NO. 1990961

Case No. 1990961 arises from Judge Woodall's order in the *Triantos* action denying Dr. Triantos's request for a refund of all occupational taxes paid by the members of the exempt class. Judge Woodall deferred any ruling on the refund issue pending further orders in the *Richards* action regarding the escrow account in which the taxes collected from the exempt taxpayers were deposited. Triantos filed a "Motion to Alter or Amend," arguing that the *Richards* court lacked jurisdiction over the *Triantos* class and that the *Triantos* class should not be compelled to seek their refund in the *Richards* action. Judge Woodall denied this motion; Triantos appeals.

ISSUES PRESENTED ON APPEAL

We consider the following issues on appeal:

1. Whether Judge Rochester's order issued in *Richards v. Jefferson County* is an appealable order.

2. If the order entered by Judge Rochester in *Richards et al. v. Jefferson County* is an appealable order, what is the appropriate standard of review to be applied in that appeal?

3. Whether the exemptions mandated in Act 406 (1967) and allowed in Ordinance No. 1120 are unconstitutional as violating the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

4. If this Court determines the exemptions mandated in Act 406 (1967) and authorized by Ordinance No. 1120 to be constitutional, whether Judge Woodall's order entered in *Triantos v. Jefferson County,* in which he enjoined Jefferson County's collection of the occupational tax from the exempt group of taxpayers, should be affirmed and whether this Court's stay of Judge Woodall's order should be lifted.

5. Whether the *Richards* class members were entitled to intervene, either as a matter of right or permissively, in the *Triantos v. Jefferson County* action.

6. If Jefferson County's collection of the occupational tax from the *Triantos* class is unconstitutional, what is the appropriate remedy?

DISCUSSION

We summarily dispose of issues 1, 2, and 5. As for the first issue, it cannot be seriously disputed that Judge Rochester's order of June 17, 1999, in which he restrained Jefferson County from collecting an occupational tax from the *Richards* class members unless it also collected the tax from the *Triantos* class members, is an appealable order. As correctly argued by Jefferson

County, Judge Rochester's order is both a mandatory injunction[3] and a prohibitory injunction.[4] Rule 4(a)(1)(A) of the Alabama Rules of Appellate Procedure authorizes an appeal from an "interlocutory order granting, continuing, modifying, refusing, or dissolving an injunction, or refusing to dissolve or to modify an injunction." Judge Rochester's June 17, 1999, order is appealable.

We next determine the appropriate standard of appellate review to be applied to Judge Rochester's ruling that the exemptions at issue in this case violate the Equal Protection Clause. Jefferson County asserts that the proper review is a *de novo* review, with no presumption of correctness, because this appeal raises a federal constitutional issue and because any findings of fact made by Judge Rochester are intimately intertwined with that constitutional law. The *Richards* plaintiffs argue that the "clearly-erroneous" standard is the applicable standard because Judge Rochester made findings of fact based on evidence presented to him *ore tenus*. The *Richards* plaintiffs assert that, on appeal from a trial court's determination that a statute or ordinance violates the Equal Protection Clause, an appellate court must apply the "facts" as determined by that trial court.

Alternatively, Jefferson County asserts that, even if the clearly-erroneous standard is the proper standard to be applied, Judge Rochester applied erroneous legal principles in his orders. The *Richards* plaintiffs argue that Judge Rochester correctly applied the law to the findings of fact contained in his order.

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[3]*Black's Law Dictionary* 788 (7th Ed. 1999) defines "mandatory injunction" as "[a]n injunction that orders an affirmative act or mandates a specified course of conduct."

[4]*Black's Law Dictionary* 788 (7th ed. 1999) defines "prohibitory injunction" as "[a]n injunction that forbids or restrains an act," and staets "This is the most common type of injunction."

Judge Rochester's November 12, 1998, order states, in pertinent part:

> "The Court has considered the evidence, argument, and pleadings in this matter, along with the applicable statutes, ordinance and case law. After a consideration of same, the Court finds that Section 4 of Alabama Act 406 (1967) and Section 1(B) of Jefferson County Ordinance 1120 (1987) are unconstitutionally violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, for the following reasons:
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> "1) Fairness is the notion underlying the concept of equal protection, and, as such, fairness must be examined when considering how a government treats its citizens. The unfair application of the County's occupational tax violates the rights of wage earners and certain select professionals by unfairly subjecting them to an employment tax while allowing other occupations to be exempt from the tax by paying a nominal yearly license fee.
>
> "2) The ordinance and statute in question each contain vague definitions which lead to subjective interpretations and inconsistent enforcement of the tax.
>
> "3) Many taxpayers pay a license fee and also pay an occupational tax, which is in direct conflict with Act 406.
>
> "4) The exemptions established by the statute and ordinance unjustly and unreasonably create a class of taxpayers who must bear the sole burden of providing occupational tax dollars for the County.
>
> "5) The exemptions are arbitrary, unfair and irrational.

It is significant to note that no real dispute exists regarding the underlying facts. The parties do not dispute the validity of the Act or the Ordinance, other than as to the constitutionality of the exemptions found therein. Nor is the evidence that was presented to Judge Rochester of the type that is subject to serious factual debate. The evidence presented to Judge Rochester included testimony from various Jefferson County taxpayers as to their professional or vocational status, their tax status, and whether they believed that tax status to be fair or unfair; the testimony of an academician (who formerly served as the assistant director of finance) regarding the legislative foundation of Act 406; the testimony of various former county officials as to their understanding of the background of Ordinance No. 1120; and testimony from current Jefferson County officials regarding Jefferson County's tax-collection efforts.

Further, the only findings of fact made by Judge Rochester addressed the ultimate constitutional issue presented for decision — whether the exempt classifications mandated by Act 406 and authorized by Ordinance No. 1120 are so unreasonable, arbitrary, and capricious as to violate the Equal Protection Clause. We find the observations of the United States Court of Appeals for the First Circuit, in *Fortin v. Darlington Little League, Inc.*, 514 F.2d 344 (1st Cir. 1975), another case involving an equal-protection challenge, to be directly on point:

> "The parties were evidently of the opinion that the district court's assessment of the relevant physical differences between boys and girls, as well as its conclusion that these differences provided 'rational' support for Darlington's exclusion of girls, were findings of fact within the meaning of Fed. R. Civ. P. 52(a). It was argued that if there is substantial evidence in the record supporting them, we must affirm.

> However, assessing such matters is not like reviewing a judgment in a personal injury case. The facts themselves, sometimes labelled 'legislative' or 'constitutional' facts, are not 'provable' in the usual sense and are part and parcel of the constitutional judgment we ourselves must make. Cf. *Drope v. Missouri,* 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975) (quoting *Watts v. Indiana,* 338 U.S. 49, 51, 69 S. Ct. 1347, 93 L. Ed. 1801 (1949)); Note, *The Presentation of Facts Underlying the Constitutionality of Statutes,* 49 Harv. L. Rev. 631, 638-39 (1936)."

514 F.2d at 348-49. See also *Brasselt v. Cota,* 761 F.2d 827 (1st cir. 1985) (recognizing that an appellate court reviewing a constitutional issue is not bound by clearly-erroneous standard of review and must conduct an independent review of facts); *Pinnell v. Board of County Comm'rs,* 127 N.M. 452, 982 P.2d 503 (N.M. Ct. App. 1999) (reviewing equal-protection challenge of county resolution under *de novo* standard); *People v. Pitts,* 222 Mich. App. 260, 564 N.W.2d 93 (1997) (reviewing equal-protection challenge of statute under *de novo* standard).

As did the First Circuit Court of Appeals in *Fortin,* supra, we conclude that any factual issues presented for resolution are "part and parcel of the constitutional judgment we ourselves must make." *Id.* at 348-49. Because it is the duty of this Court to resolve the constitutional issues presented to it, and any factual questions presented are "part and parcel" of the constitutional issues, we review all issues *de novo.* Additionally, because we conclude that our review of Judge Rochester's ruling is a *de novo* one, we need not address, at this point in the opinion, the issue whether Judge Rochester applied erroneous legal principles in his order.

As for the fifth issue, we hold that the procedural posture of these appeals renders moot the appeal by the *Richards* class from the denial of its motions to intervene

in the *Triantos* action. As stated above, we review the constitutional issues under a *de novo* standard, giving no presumption of correctness to the findings of fact made by Judge Woodall. In addition, we note that all parties with an interest in these actions are now before this Court or were allowed an opportunity to appear before it. The taxpayers that are expressly subject to the occupational tax (the *Richards* class), the taxpayers that are expressly exempt from the occupational tax (the *Triantos* class), and the taxing authority (Jefferson County), have presented to this Court their arguments, both orally and in briefs, on the issues raised in each of the four appeals. As a result, the *Richards* class members have not suffered, and will not suffer, any prejudice from the denial of their motions to intervene in the *Triantos* action. We express no opinion on the merits of those motions; we simply find that the procedural posture of these appeals makes it unnecessary for us to consider those motions.

We now turn to the substantive issues. The central issue presented in this group of appeals is whether the Fourteenth Amendment to the Constitution of the United States mandates that all professions and occupations be treated the same by Jefferson County for tax purposes. The specific issue presented is whether the exemptions from Jefferson County's occupational tax, granted to certain professions and occupations by Act 406 and by Ordinance No. 1120, violate the Equal Protection Clause of the Fourteenth Amendment.

The Fourteenth Amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." The United States Supreme Court has addressed the constraints placed on the judiciary in reviewing an equal-protection challenge of this nature. In *Plyer v. Doe,* 457 U.S. 202, 216 (1982), the Court stated:

> "The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.' *F.S. Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920). But so too, '[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.' *Tigner v. Texas,* 310 U.S. 141, 147 (1940). The initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose."

Having noted these guiding principles, we return to the constitutional issue before us with a sharper focus of the proper inquiry: Whether Jefferson County's classification of professions and occupations into different taxation categories bears some fair relationship to a legitimate public purpose. If the challenged classification bears a fair or rational relationship to a legitimate or proper public purpose, then our inquiry into the constitutional issue presented in these appeals need go no further.

BACKGROUND OF ACT NO. 406, ALA. ACTS 1967 (REG. SESS.), AND ORDINANCE NO. 1120

The Legislature enacted Act No. in 1967 with the stated purpose of "equaliz[ing] the burden of taxation by authorizing the county to impose a license or privilege

tax upon persons now engaging in certain businesses without paying any license tax thereon to either the state or county." Act No. 406, § 3. That Act authorized, but did not require, counties with populations greater than 500,000 to do the following:

> "[T]o levy a license or privilege tax upon any person for engaging in any business for which he is not required by law to pay any license or privilege tax to either the State of Alabama or the county by any of the following Article 1, Chapter 20, Title 51; Sections 176, 177, 178, 180, 182, 183, 184, 186, 429, and 826 in Title 51 of the Code of Alabama of 1940 as amended."

Article 1, Chapter 20, Title 51, as amended, refers to the general licensing fees imposed by the State of Alabama upon certain businesses and professions; Sections 176, 177, 178, 180, 182, 183, 184, and 186 in Title 51 of the Code of Alabama of 1940, as amended, refer to the license taxes imposed by the State of Alabama upon public utilities operating within the State of Alabama; Section 429 in Title 51 of the Code of Alabama of 1940, as amended, refers to the excise taxes imposed by the State of Alabama upon financial institutions; and Section 826 in Title 51 of the Code of Alabama of 1940, as amended (now repealed), refers to the fees and taxes imposed by the State of Alabama upon insurers. Thus, in summary, Act 406 authorizes, but does not require, a qualifying county to impose a license tax upon any person engaged in a business but not already paying a license tax to the State or County under the specified Code sections.

In 1968, Jefferson County exercised the taxing authority granted to it by Act 406 by enacting a General Licensing Code. In 1987, Jefferson County again exercised this taxing authority by enacting Ordinance No. 1120, which imposed an "occupational license tax" (referred to herein simply as an "occupational tax"), in the amount of

one-half percent (1½%) of the gross receipts earned within Jefferson County by every person engaged in a "vocation, occupation, calling or profession," as defined in the Ordinance. The words "vocation, occupation, calling or profession" were defined in the Ordinance as follows:

> "(B) The words 'vocation, occupation, calling and profession' shall mean and include the doing of any kind of work, the rendering of any kind of personal services, or the holding of any kind of position or job within Jefferson County, Alabama, by any clerk, laborer, tradesman, manager, official or other employee, including any non-resident of Jefferson County who is employed by any employer as defined in this section, where the relationship between the individual performing the services and the person for whom such services are rendered is, as to those services, the legal relationship of employer and employee, including also a partner of a firm or an officer of a firm or corporation, if such partner or officer receives a salary for his personal services rendered in the business of such firm or corporation, *but they shall not mean or include domestic servants employed in private homes and shall not include businesses, professions or occupations for which license fees are required to be paid under any General License Code of the County or to the State of Alabama or the County by any of the following: Chapter 12, Article 2, Title 40; §§ 40-21-50, 40-21-52, 53, 54 and 55; 40-21-57, 58, 59, and 60; 40-16-6; and 27-4-9 of the Code of Ala. 1975, as amended."*

(Emphasis added.) The Code sections referenced in Ordinance No. 1120 are the corresponding Code sections referred to in Act No. 406, as renumbered upon their transfer from the 1940 Code to the 1975 Code. Thus,

under the express language of the Jefferson County Ordinance, the occupational tax applies to every person working within the County, with the exception of those persons engaged in professions or occupations for which license fees are required to be paid under any of the Code sections set forth in the Ordinance, which are the same Code sections set forth in Act 406.

However, these are not the only persons exempt from payment of the occupational tax. Jefferson County interprets Ordinance No. 1120 to exempt the following classes of persons from payment of the occupational tax under Ordinance No. 1120: (i) individuals engaged in certain professions and occupations who are required to pay state license fees and are expressly protected by state law from county taxation; (ii) individuals who do business as sole proprietorships and pay taxes to the County under its general business-license code; (iii) individuals who do business as sole proprietors and pay taxes under the state license code, which in most instances includes a piggyback tax to the County; (iv) persons employed as domestic workers in private homes; and (v) persons employed as ordained ministers.

CASE NO. 1981680

The *Richards* class contends that the Jefferson County Ordinance

> "clearly frustrated its very purpose, and did so [in] seven separate ways, because it:
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> "1) Assembles a comical, ridiculous hodgepodge of exempted callings which is so absurd that it violates the United States Constitution's Equal Protection rationality test on its face . . . ;
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> "2) Imposes percentage rates of taxation on non-exempt wage earners which are substantially and irrationally greater

than comparatively paltry license fees paid by high income, licensed 'professionals' who are exempt from paying the tax;

"3) Grants 'preachers,' who are not exempted from the tax, exemption nevertheless, and then on a case-by-case basis arbitrarily and irrationally picks and chooses exemption status for some, but not all, preachers;

"4) Selects businesses rather than individuals for tax exemption in a manner which irrationally allows sole proprietors exemption from the tax while their otherwise identical counterparts pay it;

"5) Through error or oversight simply fails, irrationally, to include within the exempted class a broad array of state regulated 'professionals' licensed under Title 34 of the State Code — including, among others, nurses, real estate appraisers, dieticians, podiatrists, and any [sic] others;

"6) Arbitrarily and irrationally omits from the exemption list non-licensed professions which nevertheless adhere to training and certification standards and fees equal to or greater than those exempted, including teachers and police officers;

"and

"7) Irrationally equates license fees which are paid exclusively to the State, thereby conferring no benefit whatsoever upon the County, with payments to Jefferson County."

However, we find no merit in these arguments to invalidate Ordinance No. 1120 or Act No. 406 on equal protection grounds. As addressed below, we conclude that the exempt classifications created by Act No. 406

and by Ordinance No. 1120 bear a fair relationship to a legitimate public purpose. It has long been recognized that the legislature has the authority to create classifications for legislative purposes.

> "No question is or could be made . . . as to the right of a state, or a municipality with properly delegated powers, to enact laws or ordinances, based on reasonable classification of the objects of the legislation or of the persons whom it affects. 'Equal protection' does not prohibit this. Although the wide discretion as to classification retained by a legislature, often results in narrow distinctions, these distinctions, if reasonably related to the object of the legislation, are sufficient to justify the classification. Indeed, it has long been the law under the 14th Amendment that 'a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it . . . .' 'The rule of equality permits many practical inequalities.' 'What satisfies this equality has not been and probably never can be precisely defined.'
>
> "The power to make distinctions exists with full vigor in the field of taxation, where no 'iron rule' of equality has ever been enforced upon the states. A state may exercise a wide discretion in selecting the subjects of taxation 'particularly as respects occupation taxes.'"

New York Rapid Transit Corp. v. City of New York, 303 U.S. 573, 578-79 (1938) (citations omitted). Time and time again, this Court has embraced these very principles in addressing constitutional challenges to state and local legislative action. For example, in *State ex rel. Attorney General v. Spann,* 270 Ala. 396, 118 So. 2d 740 (1959), this Court upheld a statute requiring the licensing of architects, stating:

> "We believe that it is within the discretion of the legislature to determine at what point licensing is to begin and at what point it shall end.
>
> . . . .
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> "We cannot say that we know all the reasons for the classifications under the act in question. This is not necessary however. It is within the scope of legislative authority to make classifications in its regulatory enactments. Unless clearly and patently arbitrary, oppressive and capricious on its face, such classification is not subject to judicial review. Mere inequality under such classification is not sufficient to invalidate a statute."

270 Ala. at 400, 118 So. 2d at 743.

Again, in *Jolly v. City of Birmingham,* 55 Ala. App. 603, 318 So. 2d 300 (1975), the Court of Civil Appeals upheld a municipal ordinance that imposed an occupational license tax. In so holding, it recognized:

> "[I]t is only blatantly arbitrary and unreasonable classifications which will sustain [an equal protection] claim for taxation purposes.
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> . . . .
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> ". . . [I]nconsistent enforcement of an ordinance constitutes no argument against the power to pass it."
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> "Appellant urges that a discriminatory condition is created by the fact the occupational tax imposes a greater burden upon those subject to it than upon those subject to other taxes. However, various taxes inherently impose varying burdens. So long as all within the class subject to the particular tax are treated equally, there can be no complaint."

55 Ala. App. at 607-08, 318 So. 2d at 304 (citation omitted).

More recently, in *City of Prattville v. Welch,* 681 So. 2d 1050 (Ala. 1996), this Court addressed an equal-protection challenge asserted by a private liquor licensee to a municipal tax applicable to private liquor retailers but not to state owned stores. In upholding Prattville's municipal ordinance, this Court, quoting *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 359-60 (1973), stated:

> "'The Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals or entities differently from the others. The test is whether the difference in treatment is an invidious discrimination. *Harper v. Virginia Board of Elections,* 383 U.S. 663, 666, 86 S. Ct. 1079, 1081, 16 L. Ed. 2d 169 [(1966)]. Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.' As stated in *Allied Stores of Ohio v. Bowers,* 358 U.S. 522, 526 27, 79 S. Ct. 437, 440-441, 3 L. Ed. 2d 480 [(1959)]:
>
> > '"'The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that

> are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value."' "

681 So. 2d at 1052-53. In reversing the trial court's ruling that the Prattville municipal ordinance was unconstitutional, this Court stated: "[T]he trial court failed to take into consideration long-standing United States Supreme Court jurisprudence establishing a deferential rationality standard for reviewing state economic (tax) legislation under the Fourteenth Amendment. Under this standard, great deference is given to a state's classification of individuals or entities for tax purposes." *Id.* at 1052.

Finally, we note that in the seminal case of *Estes v. City of Gadsden,* 266 Ala. 166, 94 So. 2d 744 (1957), this Court upheld against an equal-protection challenge a substantially similar occupational tax levied by the City of Gadsden. The *Estes* Court stated:

> "It is seriously argued that the instant tax is in classification unreasonable, capricious and discriminatory. In the case of *Frazier v. State Tax Commission,* 234 Ala. 353, 175 So. 402, 406, 110 A.L.R. 1479 [(1937)], this court said:
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> "'As stated for this court in Nachman v. State Tax Commission, 233 Ala. 628, 173 So. 25 [(1937)], the only limitation imposed upon the Legislature is that when it proceeds to impose a tax on occupations or privileges, it must be equal and uniform. The equality and uniformity [consist] in the imposition of the like tax upon all who engage in the vocation, or who may exercise the privilege taxed. . . .'

"It has been oftentimes stated that classification under the constitution is necessarily elastic, except that it should be made according to reasonable, just and practicable rules. If the selection is neither capricious nor arbitrary and rests upon some reasonable consideration of difference or policy as between the various groups and individuals taxed in the city, the courts have held that the classification is proper and that there is no denial of the equal protection of the law. Equal protection is satisfied when all persons of the same class fairly made are subject to the same amount and terms of such tax laws.

"'. . . .

"'. . .'A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.'"

Estes, 266 Ala. 166, 173, 94 So. 2d at 750-51 (citations omitted).

Applying these constitutional principles, the *Estes* Court upheld the municipal ordinance, finding sufficient distinctions between self-employed persons working in a profession and persons working as salaried, wage-earning employees in that same profession to justify a separate

classification for purposes of the occupational-tax scheme. *Id.* at 173-74, 94 So. 2d at 751. Thus, the *Estes* Court rejected the taxpayers' claims that the ordinance violated the Equal Protection Clause because of arbitrary and unreasonable classifications.

The *Estes* Court also rejected the taxpayers' claims of discrimination based upon an alleged additional tax burden placed upon independent contractors and certain other business forms as a result of the prior adopted general-license schedule of the city. The *Estes* Court noted:

> "Doubtless there may be inequalities but our courts are committed to the proposition, as stated by the Supreme Court of the United States in *Lawrence v. State Tax Commission,* 286 U.S. 276, 284, 52 S. Ct. 556, 559, 76 L. Ed. 1102 [(1932)], as follows:
>
> > "'The equal protection clause does not require the state to maintain a rigid rule of equal taxation, to resort to close distinctions, or to maintain a precise scientific uniformity; and possible differences in tax burdens not shown to be substantial or which are based on discriminations not shown to be arbitrary or capricious, do not fall within constitutional prohibitions.'"

Estes, 266 Ala. at 174, 94 So. 2d at 751.

Additionally, the Estes Court rejected the taxpayers' claim that the amount of the tax levied (1%) was so burdensome as to be unconstitutional, recognizing that "the extent of the burden is a matter for the discretion of the lawmakers, unless the act is so arbitrary as not to be an exercise of the taxing power at all, the form of the tax being a cloak for something else." *Id.*, citing *Bessemer Theatres v. City of Bessemer,* 261 Ala. 632, 75 So. 2d 651 (1954).

Further, notwithstanding the fact that persons employed as domestic workers in private homes and ministers of recognized religious bodies were exempted, the *Estes* Court found, between those occupations and other occupations, substantial differences that justified those exemptions. *Estes,* supra, at 173, 94 So. 2d at 750. See also *McPheeter v. City of Auburn,* 288 Ala. 286, 259 So. 2d 833 (1972) (relying upon *Estes* to uphold Auburn's ordinance imposing an occupational tax, which also exempted domestic workers and ministers). Because the *Estes* Court found that the classifications created by the Gadsden ordinance rested upon some reasonable consideration of difference or policy and because all persons of the same class were subject to the same tax, the requirement of equal protection was satisfied.

After carefully reviewing the record and the briefs, as well as studiously considering the oral arguments presented to this Court, we conclude that the exemptions mandated in Act 406 and allowed in Ordinance No. 1120 do not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. As the *Estes* Court held regarding the classifications at issue in that case, we conclude that the exempt classifications created by Act 406 and by Ordinance No. 1120 rest upon a reasonable consideration of difference or policy between the various groups and individuals. We also hold that the classifications created by Act 406 and Ordinance No. 1120 bear a fair relationship to a legitimate public purpose. For these reasons, the requirement of equal protection is satisfied.

First, we find the exemptions provided in Ordinance No. 1120 for persons engaged in professions and occupations, who are required to pay state license fees and who are expressly protected by state law from further imposition of license taxes, to be fairly and reasonably related to a legitimate governmental purpose. Although we do

not profess to understand the Legislature's reasons for creating the scheme of state-licensing requirements now in existence, we are not required to understand and accept its panoply of reasons for the taxation schemes it is authorized to enact. See *State ex rel. Attorney General v. Spann,* supra. We simply conclude that, as Jefferson County argued, the prohibition found in Act 406 against further taxation of persons engaged in professions and occupations subject to the state-licensing requirements furthers several possible legitimate governmental purposes. These governmental purposes may be those of economic development, statewide uniformity, or the protection of a future source of tax revenue. Any one of these purposes, or all of them, could serve as the rational and legitimate basis of the exempt classifications created by Act 406 (and adopted by legislative mandate in Ordinance No. 1120), which prohibits further taxation of persons engaged in the specified professions and occupations. Because we conclude that a fair and rational basis supports the challenged classification, we conclude that the *Richards* class has not met its burden of negating any conceivable set of facts that would support this challenged classification. See *Thorn v. Jefferson County,* 375 So. 2d 780, 787 (Ala. 1979) (plaintiff's burden of proof in challenging the constitutionality of an ordinance is to negate "every conceivable or reasonable basis which might support the [challenged] classification").

The second and third class of individuals considered exempt under Ordinance No. 1120 are those who do business as sole proprietors and who pay taxes to the County under its general business-license code and those individuals who do business as sole proprietors and pay taxes under the state license code, which in most instances includes a piggyback tax to the County. The *Richards* class contends that these classifications allow those individuals doing business as sole proprietors an

arbitrary and unreasonable exemption from the occupational tax, while their otherwise identical counterparts pay the occupational tax.

We reject this argument. This Court wrote in *Estes:*

> "[S]ome plumbers or architects or accountants are self employed and offer their services to the general public. Others do not do this but hire out to a specific employer. Does the fact that there may be some plumbers, architects, accountants, who fall in the first group of self employed persons, and some architects, accountants or plumbers who fall in the second group, mean there is no substantial distinction which makes the one class different from the other? The fact that the employee group is salaried or wage-earning, whereas the other group is not, would provide the substantial distinction which makes the one class different from the others and brings within the influence all who are under those same salary or wage earning conditions and applies equally to all in the class at the rate of one percent. Furthermore, we see no reason why, for example, plumbers, architects, or accountants must each be put in a separate class, because of a difference in the nature of their respective work. Each can, of course, be put into a separate classification and if so, why can they not be put in the same class if they are all paid by an employer and draw their pay in the City of Gadsden?"

Estes, 266 Ala. at 173-74, 94 So. 2d at 751 (citations omitted). We agree with the rationale stated in *Estes* and conclude that the separate classification of individuals who do business as sole proprietors and buy business licenses pursuant to the County's general licensing code or the State License Code is fairly related to a legitimate governmental purpose. Exempting a self-employed

individual from payment of an occupational tax, a tax being levied on the privilege of earning money in the role of an employee, certainly cannot be deemed irrational. Additionally, avoiding double taxation on a self-employed individual, who is required to pay the business-license tax as well as the expenses associated with running a business, furthers a potential governmental purpose of encouraging the survival of small business. We conclude that the exemption recognized for individuals who do business as sole proprietors and who pay a business-license tax pursuant to the County's general licensing code or pursuant to the state licensing code does not violate the Equal Protection Clause. *Estes,* supra.

The *Richards* class also challenges the exempt classifications allowed by Ordinance No. 1120 for persons employed as domestic workers in private homes and persons employed as ordained ministers. We need not engage in an extensive analysis of the constitutionality of these classifications, because this Court expressly recognized them to be valid in *Estes,* supra, and again in *McPheeter v. City of Auburn,* 288 Ala. 286, 292, 259 So. 2d 833, 837 (1972) ("In *Estes,* the exemption of domestic servants in private homes, and ordained ministers was specifically held constitutional since those two groups constituted reasonable classes which possess characteristics that distinguish them from the other taxed classes."). We again hold that the exempt classifications granted to domestic workers and ordained ministers under Ordinance No. 1120 do not violate the Equal Protection Clause.

Because we find a fair and rational basis underlying the five exempt taxpayer classifications mandated by Act 406 and authorized by Ordinance No. 1120, as interpreted by Jefferson County, we pretermit any further discussion or analysis of any remaining contentions raised by the *Richards* plaintiffs. See *New York Rapid Transit Corp.,* 303 U.S. at 578 (recognizing that, if any state of

facts reasonably can be conceived that would sustain the challenged classification, the judiciary's inquiry into the constitutionality of the legislative act is complete). We note that we have conducted our analysis of the constitutional issue presented in Case No. 1981680 in accordance with the presumption that an ordinance is presumed reasonable and valid, and that the burden is on the one challenging the ordinance to clearly show its invalidity. See *Thorn v. Jefferson County,* 375 So. 2d 780, 787 (Ala. 1979) (discussing presumption of validity of challenged classification and plaintiff's burden of proof to negate "every conceivable or reasonable basis which might support the classification"). Moreover, our review has been constrained by the long-standing principles of statutory construction and interpretation holding that the "wisdom, propriety or expediency of the ordinance is not a matter of review by this court. That is the province of the law-making body of the [County]. The court's duty is to consider the constitutionality and the validity of the ordinance under the constitution and laws of the State of Alabama." *Estes,* 266 Ala. at 170, 94 So. 2d at 747. In Case No. 1981680, we reverse Judge Rochester's order of June 17, 1999, and render a judgment in favor of Jefferson County. We also remand Case No. 1981680 with instructions for the trial court to enter an order directing and implementing a refund to the *Triantos* class members of all moneys collected pursuant to Judge Rochester's order of June 17, 1999.

CASE NO. 1990836

Jefferson County appeals from Judge Woodall's order of January 12, 2000, entered in *Triantos v. Jefferson County et al.,* restraining Jefferson County from continuing to collect the occupational tax from the exempt taxpayers, the members of the *Triantos* class. Judge Woodall's order

of January 12, 2000, declared that the members of the *Triantos* class were specifically excluded from the operation of Act 406 and Ordinance No. 1120; that the members of the *Triantos* class were thereby exempted from tax liability under the Act and the Ordinance; and that Jefferson County had no authority to levy the occupational tax upon the members of the *Triantos* class or to collect it from them. We affirm Judge Woodall's order.

Counties, being political subdivisions of the state, have no inherent power of taxation but have only such taxing power as the Legislature delegates to them. "'[U]pon them, in the absence of special constitutional restriction, the general assembly may confer the taxing power in such measure as it deems expedient, — "in other words, with such limitations as it sees fit as to the rate of taxation, the public purposes for which it is authorized, and the objects (the persons and property) which shall be subjected to taxation."'" *Frazier v. State Tax Comm'n*, 234 Ala. 353, 355, 175 So. 402, 403 (1937) (quoting earlier authorities). Although *Frazier* addressed a municipality's power to tax, the principles stated in *Frazier* are equally applicable to a county.

Jefferson County's authority to impose the occupational tax exists, and is limited, by virtue of its enabling legislation — Act 406. That Act specifically prohibits any county to which the Act applies from further taxing those persons subject to the state licensing sections referenced therein. The persons referenced in Act 406 are the very members of the *Triantos* class.

We agree with Judge Woodall, that Jefferson County has no authority to levy the occupational license tax upon the members of the *Triantos* class or to collect it from them. We affirm Judge Woodall's order of January 12, 2000, in which he restrained Jefferson County from continuing to collect the occupational tax from the members of the *Triantos* class. We further conclude that

the stay of Judge Woodall's order, issued by this Court on March 22, 2000, should be lifted. However, the effect of our ruling in Case No. 1981680 will moot the necessity of further action by the trial court in Case No. 1990836.

CASE NO. 1990961

Triantos appeals from Judge Woodall's failure to order a refund of the moneys collected from the exempt taxpayers by Jefferson County pursuant to Judge Rochester's June 17, 1999, order. His appeal is moot, however, in light of our remand order in Case No. 1981680.

CONCLUSION

Case No. 1981680. Having concluded that the exempt classifications mandated by Act No. 406 and authorized by Ordinance No. 1120, as interpreted and applied by Jefferson County, do not violate the Equal Protection Clause, we reverse Judge Rochester's injunctive order of June 17, 1999, entered in Case No. 1981680, in which he enjoined Jefferson County from further collecting the occupational tax from the members of the *Richards* class members unless it also collects the tax from the members of the *Triantos* class. The exempt classifications, as currently interpreted and applied, do not render the Ordinance unconstitutional on equal-protection grounds and, therefore, it is not for the courts of this State to direct or limit Jefferson County in its implementation of that Ordinance. We reverse Judge Rochester's order of June 17, 1999, and render a judgment in favor of Jefferson County on the complaint. We also remand Case No. 1981680 with instructions for the trial court to enter an order directing a refund from the escrow account of all moneys collected from the *Triantos* class members pursuant to Judge Rochester's order of June 17, 1999, order.

Case No. 1990836. For these same reasons, we affirm Judge Woodall's injunctive order of January 12, 2000, entered in Case No. 1990836, in which Judge Woodall enjoined Jefferson County from levying and/or collecting the occupational tax from the *Triantos* class pursuant to Ordinance No. 1120 or Act 406. We conclude that the stay granted by this Court and dated March 22, 2000, of Judge Woodall's injunctive order should be lifted, although our remand in Case No. 1981680 will make unnecessary further action by the trial court in Case No. 1990836.

Case No. 1990923. As discussed above, the appeal by the *Richards* plaintiffs from the denial of their motion to intervene in the *Triantos* action is rendered moot by the procedural posture of these appeals.

Case No. 1990961. In light of our ruling in Case No. 1981680, the issue raised in this appeal by the *Triantos* class, whether Judge Woodall erred in deferring any ruling on their request for a refund from the escrow account of all moneys collected by Jefferson County as occupational taxes from the *Triantos* class pursuant to Act 406 and Ordinance No. 1120, is rendered moot.

1981680 — REVERSED AND JUDGMENT RENDERED AND CASE REMANDED WITH INSTRUCTIONS.

1990836 — AFFIRMED; STAY LIFTED.

1990923 — APPEAL DISMISSED.

1990961 — APPEAL DISMISSED.

Houston, Lyons, Brown, Harwood, and Stuart, JJ., concur.

Moore, C.J., concurs in part and dissents in part.

Johnstone, J., concurs in part, concurs in the result in part, and dissents in part.

Woodall and See, JJ., recuse themselves.

MOORE, Chief Justice (concurring in part and dissenting in part).

In 1987, acting pursuant to Act No. 67-406, Ala. Acts 1967, the Jefferson County Commission adopted Ordinance 1120. Ordinance 1120 imposed a "license fee" of 1½ of 1% (0.5%) on the earnings received from "any kind of work, the rendering of any kind of personal services, or the holding of any kind of position or job within Jefferson County, Alabama by any clerk, laborer, tradesman, manager, official, or other employee." Ordinance 1120 exempted three classes of individuals from its purview: domestic workers in private homes, individuals doing business as "sole proprietorships" who paid fees under the State license code, and individuals doing business as "sole proprietorships" who paid fees to Jefferson County under the County's general business-license code. As a result, the ordinance created an unusually diverse class of exempt citizens, including lawyers, doctors, magicians, astrologers, and operators of hot-dog stands. Some citizens have not been required to pay any fee, either under the ordinance or under the licensing code. Numerous others, including nurses and real-estate appraisers, have been required to pay both this "fee" under the ordinance and a separate license fee. The tax burden that Ordinance 1120 imposed was also unusually diverse. While the license code requires some of the exempt individuals to pay a fixed and nominal sum, the ordinance requires other citizens to pay a percentage of their income.

Jefferson County argued to the United States Supreme Court that the levy made by Ordinance 1120 was an income tax, not a license fee. See *Jefferson County, Alabama v. Acker*, 527 U.S. 423, 439 (1999). Jefferson County then argued to this Court that this levy was a license fee, not an income tax. See *Parker v. Jefferson County*, [Ms. 1991004, April 20, 2001] ___ So. 2d ___ (Ala. 2001).

The *Richards* class challenged Ordinance 1120, asserting that Ordinance 1120 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The trial court agreed, holding that the exemptions embodied in Ordinance 1120, and the exemptions established by the manner in which Jefferson County has enforced Ordinance 1120, violate the Equal Protection Clause. I agree. Even if this Court ignores the hypocrisy of Jefferson County's mutually exclusive arguments to the United States Supreme Court and to this Court, and even if this Court is not bothered by what I consider to be a troubling precedent — that a levy based on a percentage of income is a fee and not an income tax — I conclude that the trial court correctly held that Jefferson County had violated the Equal Protection Clause in its application of Ordinance 1120.

Today's main opinion states:

> "The overarching issue presented in this group of appeals is whether the Equal Protection Clause of the Fourteenth Amendment mandates that all professions and occupations be treated the same by the State of Alabama and by Jefferson County for occupational-tax purposes."

___ So. 2d at ___. This attempted statement of the issue is the fundamental error the majority makes in its analysis and in its judgment reversing the judgment in case No. 1981680. In *Eagerton v. Gulas Wrestling Enterprises, Inc.*, 406 So. 2d 366, at 370 (Ala. 1981), this Court established the fundamental issue in an equal-protection challenge to a license fee or a tax:

> "The basic tenet of the equal protection clause is not that all persons must be treated equally, but rather that all persons similarly situated must be treated equally."

See *F.S. Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920) ("[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."). In *Eagerton,* supra, as in the instant case, the plaintiffs contested a levy by Jefferson County on equal-protection grounds. Both the *Richards* plaintiffs and Jefferson County cited *Eagerton* as controlling precedent.

The main opinion quotes *Jolly v. City of Birmingham,* 55 Ala. App. 603, 608, 318 So. 2d 300, 304 (1975), for this proposition: "[I]nconsistent enforcement of an ordinance constitutes no argument against the power to pass it." In *Allegheny Pittsburgh Coal Co. v. County Commission,* 488 U.S. 336 (1988), however, a unanimous United States Supreme Court held that inconsistent enforcement of an otherwise constitutional statute was arbitrary and capricious and thus a violation of the Equal Protection Clause.

Jefferson County deviated from the precedent in *Eagerton* supra, and *F.S. Royster Guano Co.,* supra, by exempting "preachers," then indulging in an enforcement scheme that arbitrarily and capriciously applied that exemption to preachers who were ordained, but not to preachers who were "unordained."

> "The only limitation imposed upon the Legislature is that when it proceeds to impose a tax on occupations or privileges, it must be equal and uniform. The equality and uniformity consist in the imposition of the like tax upon all who engage in the vocation, or who may exercise the privilege taxed."

Nachman v. State Tax Comm'n, 233 Ala. 628, 635, 173 So. 25, 31 (1937) (citations omitted).

Jefferson County's enforcement scheme for Ordinance 1120, by enforcing the ordinance against "unordained" ministers but exempting "ordained" ministers, violated the precedent this Court set in *Eagerton*, supra, and *Nachman*, supra, and the precedent the United States Supreme Court set in *F.S. Royster Guano Co.*, supra.

I concur in the main opinion as it relates to Case No. 1990836, Case No. 1990923, and Case No. 1990961. The effort to repair the equal-protection defect noted above by taxing all of the individuals who were previously exempt was a separate error, as the trial judge held. This Court wrote in *Siegelman v. Chase Manhattan Bank (USA), N.A.*, 575 So 2d 1041, 1046 (Ala. 1991):

> "Neither is it the role of the courts to 'usurp the role of the legislature and correct defective legislation or amend statutes under the guise of [judicial] construction.'"

(Citations omitted.) The Court properly holds that the appeals in Case No. 1990923 and Case No. 1990961 have been rendered moot by the resolution of the first two cases.

I would affirm the judgment of the trial court in the *Richards* litigation, because that court's ruling was constitutionally correct; it was correct because Jefferson County's enforcement of Ordinance 1120 was constitutionally improper. I therefore respectfully dissent as to Case No. 1981680. I concur as to Case No. 1990836, Case No. 1990923, and Case No. 1990961.

JOHNSTONE, Justice (concurring in part, concurring in the result in part, and dissenting in part).

I respectfully dissent from the holding that Ordinance 1120 is constitutional. This ordinance arbitrarily and capriciously exempts a hodgepodge of categories of taxpayers while it does not exempt other virtually indistinguishable categories of taxpayers. These exemptions are not supported or dignified by Act No. 406, Ala. Acts 1967, which requires only a well-defined and logically limited subset of the exemptions. Therefore, I respectfully dissent from the judgment in case number 1981680, *Jefferson County v. Richards,* reversing that aspect of the order by the trial court declaring that the ordinance, judged together with all of its exemptions, is unconstitutional.

I agree, however, that the trial court lacked authority to remedy the unconstitutionality of Ordinance 1120 by requiring Jefferson County to collect the tax even from the exempted taxpayers. Therefore, I concur in the judgment of this Court reversing and rendering that aspect of the order of the trial court in case number 1981680, *Jefferson County v. Richards,* authorizing Jefferson County to collect the tax from the exempted taxpayers in order to save the constitutionality of the ordinance. I further concur in the judgment of this Court remanding case number 1981680, *Jefferson County v. Richards,* "with instructions for the trial court to enter an order directing a refund to the *Triantos* class members of all monies collected pursuant to Judge Rochester's order of June 17, 1999."

I further concur in the judgment of this Court in case number 1990836, *Jefferson County v. Triantos,* affirming Judge Woodall's January 12, 2000 injunction enjoining Jefferson County from levying or collecting the occupational tax from the *Triantos* class. I further concur that we should lift our stay of Judge Woodall's injunction.

I concur in the result in case number 1990923, *Richards v. Triantos.* I would affirm the denial of the *Richards* plaintiffs' motion to intervene in the *Triantos* action. The majority achieves the same result by declaring this appeal moot and dismissing it.

Finally, in case number 1990961, T*riantos v. Jefferson County,* I concur that this appeal is moot. The *Triantos* appellants are getting the relief they seek from our judgment in case number 1981680, *Jefferson County v. Richards,* instructing the trial court to direct Jefferson County to refund the monies collected from the *Triantos* class. Therefore, I concur in the dismissal of the appeal in case number 1990961, *Triantos v. Jefferson County.*

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

JASON RICHARDS, et al.,

PLAINTIFFS,

VS. CASE NO. CV-92-3191

JEFFERSON COUNTY, et al.,

DEFENDANTS.

JUDGMENT

The Court has considered the evidence, argument and pleadings in this matter, along with the applicable statutes, ordinance and caselaw. After a consideration of same, the Court finds that Section 4 of Alabama Act 406 (1967), and Section 1 (B) of Jefferson County Ordinance 1120 (1987), are unconstitutionally violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, for the following reasons:

1) Fairness is the notion underlying the concept of equal protection, and, as such, fairness must be examined when considering how a government treats its citizens. The unfair application of the County's occupational tax violates the rights of wage earners and certain select professionals by unfairly subjecting them to an employment tax while allowing other occupations to be exempt from the tax by paying a nominal yearly license fee.

2) The ordinance and statute in question each contain vague definitions which lead to subjective interpretations and inconsistent enforcement of the tax.

3) Many taxpayers pay a license fee and also pay an occupational tax, which is in direct conflict with Act 406.

4) The exemptions established by the statute and ordinance unjustly and unreasonably create a class of tax-

payers who must bear the sole burden of providing occupational tax dollars for the County.

5) The exemptions are arbitrary, unfair and irrational.

Accordingly, it is hereby Ordered as follows:

(a) Defendant's motion to dismiss for want of jurisdiction is denied.

(b) The Jefferson County Commission shall have until January 15, 1999, to seek the removal of the unconstitutional exemptions from Ordinance 1120 through proposed legislation or to remove the occupational tax altogether. A hearing is set for January 19, 1999, at 10:00 a.m., at the Jefferson County Courthouse to determine if there has been compliance with the Court's order. The Court will also determine any proper injunctive relief required for compliance.

(c) A hearing is set for June 16, 1999, at 10:00 a.m. at the Jefferson County Courthouse for the Court to determine if the Alabama legislature has remedied Act 406, and if there has been corresponding action by the Jefferson County Commission with regard to Jefferson County Ordinance 1120.

(d) At the compliance hearing of June 16, 1999, the Court shall determine what amount, if any, should be refunded the class and subclass members. The Court shall also consider the issue of plaintiffs attorney's fees. The Court may also determine further injunctive relief.

(e) After January 19, 1999, there will be a separate order entered by this Court regarding the class and subclass members.

(f) The Court retains jurisdiction of this matter.

Done and Ordered this 12th day of November, 1998.

/s/ John E. Rochester

JOHN E. ROCHESTER
CIRCUIT JUDGE SPECIALLY SITTING

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

JASON RICHARDS and FANNIE HILL, individually and on behalf of all employees of the United States of America, who are subject to the Jefferson County, Alabama occupational tax which is more particularly described by this complaint; and GEORGE DAVID DYKES and JOAN FOLEY DYKES, individually and on behalf of all employees of the United States who are subject to the Jefferson County, Alabama occupational tax which is more particularly described by this complaint;	*	CIVIL ACTION NO. CV-92-03191
PLAINTIFFS,	*	
VS.	*	
JEFFERSON COUNTY, a political subdivision of the State of Alabama, and RANDY GODEKE, individually and in his official capacity as Director of the Department of Revenue for Jefferson County, Alabama, and as successor in office to C. H. Ritchie, former Director of the Department of Revenue for Jefferson County, Alabama	*	
DEFENDANTS.	*	

ORDER

After a consideration of the law, statutes, legal evidence and argument of counsel for the parties the Court finds that Defendant is entitled to summary judgment as to certain claims raised by the Plaintiffs due to the doctrine of res judicata, but that certain of Plaintiffs' claims should not be dismissed. The Court FINDS as follows:

1. In *Beddingfield v. Jefferson County,* 527 So. 2d 1270 (Ala. 1988), neither the trial court nor the Alabama Supreme Court determined whether Alabama Act No. 406 (Alabama Legislature 1967), authorizing the tax in question, or Jefferson County Ordinance No. 1120 (Jefferson County Commission 1987), imposing the tax in question, violates the equal protection clause of the United States Constitution by creating an unreasonable, unjust and improper classification of citizens subject to the tax, while exempting certain citizens from said tax in an arbitrary, irrational and unjust manner.

2. In *Beddingfield v. Jefferson County,* 527 So. 2d 1270 (Ala. 1988), neither the trial court nor the Alabama Supreme Court determined whether the tax in question violates the Buck Act (4 U.S.C. §111) as it pertains to federal employees.

3. The trial court in *Beddingfield v. Jefferson County,* 527 So. 2d 1270 (Ala. 1988), did in fact consider the constitutionality of Alabama Act No. 406 and Jefferson County Ordinance No. 1120 as it relates to the Constitution of Alabama of 1901 and found "nothing" in said Act to be "repugnant" to such a degree as to invalidate the Act, and further did not find Ordinance No. 1120 to be "invalid". (*Order* of Judge Braxton Kittrell, Specially Sitting, CV-87-504-465 and CV-87-504-469, Jefferson County, Alabama, December 11, 1987).

Thus the state constitutional issues in this matter have been previously adjudicated.

Accordingly, Summary Judgment is GRANTED in favor of Defendant, and against Plaintiffs as to Counts Three and Four of the Complaint based on the doctrine of res judicata. Summary Judgment is DENIED as to Counts One and Two.

Done and Ordered this 8th day of April, 1993.

/s/ John E. Rochester

JOHN E. ROCHESTER
CIRCUIT JUDGE
SPECIALLY SITTING

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

JASON RICHARDS and FANNIE HILL, individually and on behalf of all employees, excluding employees of the United States of America, who are subject to the Jefferson County, Alabama occupational tax which is more particularly described by this complaint; and GEORGE DAVID DYKES and JOAN FOLEY DYKES, individually and on behalf of all employees of the United States who are subject to the Jefferson County, Alabama occupational tax which is more particularly described by this complaint;	*	CIVIL ACTION NO. CV9203191
Plaintiffs,	*	
vs.	*	
JEFFERSON COUNTY, a political subdivision of the State of Alabama, and RANDY GODEKE, individually and in his official capacity as Director of the Department of Revenue for Jefferson County, Alabama, and as successor in office to C. H. Ritchie, former Director of the Department of Revenue for Jefferson County, Alabama	*	
Defendants.	*	

COMPLAINT

Plaintiffs, by and through their undersigned counsel, complain and allege as follows:

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to Rule 57, Alabama Rules of Civil Procedure and 42 U.S.C. 1983, as this is a civil action arising under the laws and Constitution of the United States. This action involves a violation of federal law for which 42 U.S.C. 1983 provides a remedy, and to which Rule 37 of the Alabama Rules of Civil Procedure is applicable. A question of intergovernmental immunity arising under the Buck Act, 4 U.S.C. 101, et seq, is presented by Plaintiffs Dykes individually, and on behalf of all similarly situated federal employees. Venue lies in the Circuit Court of Jefferson County, Alabama, the tax challenged by this action being levied and collected by Jefferson County, Alabama, against and from plaintiffs, and similarly situated class members within Jefferson County, Alabama.

PARTIES

2. Plaintiff Jason Richards is a courier privately employed by a law firm in Jefferson County, Alabama, and is a resident citizen of Jefferson County, Alabama; Fannie Hill is a domestic servant privately employed in commercial buildings in Jefferson County, Alabama, and is a resident citizen of Jefferson County, Alabama; they bring this action individually on their behalf, and in a representative capacity on behalf of all other employees in Jefferson County, Alabama, other than employees of the United States of America, who have been subject to the levy, collection and payment of taxes established by Jefferson County Ordinance 1120, commonly known as the Jefferson County Occupational Privilege Tax ("the occupa-

tional tax") since January 1, 1988. George David Dykes is a Reclamation Specialist employed by the United States of America in the Office of Surface Mining, Department of the Interior in Jefferson County, Alabama, and is a resident citizen of Jefferson County, Alabama; Joan Foley Dykes is a Registered Nurse employed by the United States of America in the Department of Veterans' Affairs in Jefferson County, Alabama, and is a resident citizen of Jefferson County, Alabama; they bring this action individually on their own behalf, and in a representative capacity on behalf of all other employees of the United States of America, who have been subject to the levy, collection and payment of the occupational tax since January 1, 1988. Plaintiffs Jason Richards, Fannie Hill, and Joan Foley Dykes have been required by their employers to pay the occupational tax at all times relevant to these proceedings, continuously since January 1, 1988, when the occupational tax became effective. Plaintiff George David Dykes was required by his employer to pay the occupational tax for approximately one year after enactment of the occupational tax, after which he refused to continue to do so, based upon the authorities cited herein.

CLASS ACTION AVERMENTS

3. This lawsuit is brought by plaintiffs as a class action, on their own behalf and on behalf of all others similarly situated, under the provisions of Rule 23(a) and Rule 23(b)(1) of the Alabama Rules of Civil Procedure for injunctive and declaratory relief, and for an order awarding members of the plaintiff classes compensatory damages in sums equal to the amounts of taxes illegally levied, collected and paid by them, and for relief incident and subordinate thereto, including costs and attorneys fees pursuant to 42 U.S.C. 1988, and such other authorities as shall be determined applicable to this action.

4. The classes represented by plaintiffs in this action, and of which plaintiffs themselves are members, consist of all persons subject to the occupational tax, both federal and non-federal employees, who have been subject to its levy, collection and payment since January 1, 1988, when the occupational tax became effective.

5. The exact number of members of the classes, as herein identified, is not known, but it is estimated that there are thousands of members of each class. The classes are so numerous that joinder of individual members herein is impracticable.

6. There are common questions of law and fact in the action that relate to and affect the rights of each member of the classes represented by the named plaintiffs and the relief sought is common to both classes, namely a declaration that the occupational tax is unconstitutional.

7. The claims of plaintiffs, who are representatives of the class herein are typical of the claims of the classes they represent, in that the claims of all members of the classes, including plaintiffs, depend on a showing of the unconstitutionality of the occupational tax in a manner which is beneficial to each. There is no conflict as between any individual named plaintiff and any other member of either class with respect to this action, or with respect to the relief sought herein. The Dykes Class of federal employees are beneficiaries of federal and state statutes which prohibit discrimination in a manner which is consistent with the general prohibition of discrimination applicable to the Richards/Hill Class of non-federal employees, and both classes are protected equally by the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States, and the state laws cited herein.

8. The named plaintiffs are the representative parties for their respective classes, and are able to, and will, fairly and adequately protect the interests of the classes they

represent. The attorneys for plaintiffs are experienced and capable in litigation in the field of constitutional, tax and civil rights claims, and have successfully represented claimants in other litigation of this nature.

ALLEGATIONS OF FACT

9. On or about January 1, 1988, Defendant Jefferson County levied and began collecting, and Plaintiffs and the classes they represent began involuntarily paying, the occupational tax, which was described by Defendant as a "license or privilege tax on natural persons engaged in any vocation, occupation, calling or profession who are not required by law to pay any license or privilege tax to the state or county." A copy of the occupational tax ordinance is attached to this complaint, and made a part hereof as Exhibit A.

10. The occupational tax is calculated as one-half of one percent of the gross earnings of plaintiffs and members of both classes, but is characterized by Defendant as a license or privilege tax, rather than an income tax. Specifically the taxing ordinance provides:

> It shall be unlawful for any person to engage in or follow any vocation occupation, calling or profession as defined in Section 1 within the County on and after the 1st day of January, 1988, without paying license fees to the County for the privilege of engaging in or following such vocation, occupation, calling or profession, which license fees shall be measured by one-half percent (1/2%) of the gross receipts of each such person.

11. The taxing ordinance also defines gross receipts and compensation, as follows:

> The words "gross receipts" and "compensation" shall have the same meaning, and both words

> shall mean and include the total gross amount of all salaries, wages, commissions, bonuses or other money payment of any kind, or any other considerations having monetary value, which a person receives from or is entitled to receive from or be given credit for by his employer for any work done or personal services rendered in any vocation, occupation, calling or profession, including any kind of deductions before "take home" pay is received; but the words "gross receipts" and compensation shall not mean or include amounts paid to traveling salesmen or other workers as allowance or reimbursement for traveling or other expenses incurred in the business of the employer, except to the extent of the excess of such amounts over such expenses actually incurred and accounted for the by employee to the employer.

12. The occupational tax carves out of its scope, by way of its definition of "vocation, occupation, calling and profession" a substantial array of persons, as follows:

> The words "vocation, occupation, calling and profession" shall mean the doing of any kind of work, the rendering of any kind of personal services, or the holding of any kind of position or job within Jefferson County, Alabama, by any clerk, laborer, tradesman, manager, official or other employee, including any non-resident of Jefferson County who is employed by any employer as defined in this section, where the relationship between the individual performing the services and the person for whom such services are rendered is, as to those, services, the legal relationship of employer and employee, including also a partner of a firm or an officer of a firm or corporation, if such partner or officer receives a salary for his personal services rendered in the business of such firm or corpora-

> tion, but they shall not mean or include domestic servants employed in private homes and shall not include businesses, professions or occupations for which license fees are required to be paid under any General License Code of the County or to the State of Alabama or the County by any of the following: Chapter 12, Article 2, Title 40; Sections 40-21-50, 40-21-52, 53, 54 and 55; 40-21-57, 58, 59 and 60; 40-16-6; and 27-4-9 of the Code of Ala. 1975, as amended.

and also includes within its ambit all federal employees represented here by Plaintiffs Dykes, as follows:

> The words "vocation, occupation, calling and profession" shall also mean and include the holding of any kind of office or position either by election or appointment, by any federal, state, county or city officer or employee where the services of such official or employee are rendered within Jefferson County, Alabama.

13. The occupational tax broadly defines "employer" to "mean and include any person, business, firm, corporation, partnership, association or any other kind of organization who or that employs any person in any vocation, occupation, calling or profession in Jefferson County, Alabama, within the meaning of subsection (B) of Section 1 of this Ordinance." (This subsection is set forth in full at paragraph 12 of this complaint). Defendant, by and through its Director of Revenue and County Attorney, has interpreted "employer" to include the United States of America, and "employee" to include all federal employees in Jefferson County, including all United States District Judges in the Northern District.

14. The occupational tax by its terms, and in actual practice, exempts from its levy, collection and payment businesses and vocations or occupations listed at Chapter 12, Article 2, Title 40, Code of Ala. 1975, as amended,

which range from attorneys, certified public accountants, dentists and physicians to blueprint makers, casket manufacturers, pig iron storage operators, lightning rod installers and snuff retailers, and it includes a specific exemption for domestic servants employed in private homes. By its terms and in actual practice, it taxes all federal employees, including all United States District Judges in the Northern District of Alabama, all Circuit, District and Probate Judges in Jefferson County, and an array of other occupations, including couriers, secretaries, skilled and unskilled laborers, police officers, business executives, teachers and domestic servants not employed in private homes.

15. The net effect, dollarwise, of the occupational tax, is an absurdity which allows, by way of example, physicians and attorneys earning hundreds of thousands of dollars a year to pay a license fee of $150.00 or less and avoid the occupational tax — which would be levied at more than ten times the amount of the license fee paid by these high income professionals. In all cases, the occupational tax imposes upon those citizens against whom it is levied and collected a percentage of income tax which is substantially more than the license fees paid by similarly situated persons exempted from its burden.

16. The occupational tax, on its face and in actual practice, is arbitrary and capricious, and discriminatory in a manner which defies logic and, insofar as federal employees are concerned, 4 U.S.C. 111. The array of persons subject to the occupational tax, when compared with the array of persons exempted from the tax, and the concomitant disparity in taxes paid by and between occupations in Jefferson County, Alabama which falls within and without the burden of the occupational tax, render it irrational, unduly burdensome, and violative of the equal protection clause and the due process clause of

Fourteenth Amendment to the Constitution of the United States.

17. The content, nature and characteristics of the employment of Plaintiffs Dykes, Richards and Hill, and all the members of the classes they represent, are neither reasonably, rationally or fairly different, nor professionally distinct, from the content, nature and characteristics of the employment of the above described persons exempt from the occupational tax, and the economic burden thrust upon them by Defendant, relative to those exempted, is substantial and absurd.

18. The irrationality and unconstitutionality of the occupational tax is well known to the Defendant's officers and agents responsible for its administration and collection, and has resulted in their adoption of a policy of further exemption from its levy and collection federal employees who refuse to pay it. This pay-if-you-wish policy is itself arbitrary and capricious, irrational, indicative of Defendant's callous disregard of the constitutional rights of other federal and private employees from whom the tax is collected, and demonstrative of Defendant's cognizance of the constitutional defects complained of herein.

19. Plaintiffs aver that unless Defendant is enjoined and restrained by the court from enforcing the occupational tax ordinance, they will suffer economic injury.

COUNT ONE
DYKES CLASS BUCK ACT CLAIMS AND FEDERAL CONSTITUTIONAL CLAIMS

20. Plaintiffs Dykes, individually and on behalf of the above described class of employees of the United States which they represent, claim Defendants, a political subdivision of the State of Alabama and its Director of Revenue, acting by and through their County Attorney, and

such other administrative officers as have acted and continue to act in concert with them, were and are acting under color of a statute, ordinance, regulation, custom or usage of the State of Alabama in subjecting its citizens described herein to a deprivation of rights, privileges or immunities secured by the Constitution and laws of the United States, specifically 4 U.S.C. 111 and the due process and equal protection clauses of the Constitution of the United States.

21. The occupational tax violates the equal protection guaranties of the Fourteenth Amendment to the United States Constitution and 4 U.S.C. 111 by unreasonably and arbitrarily favoring the above described state, local and private employees who are exempted from its purview in the unequal manner described above while taxing the similarly situated federal employees represented by Plain tiffs Dykes as described herein.

22. The occupational tax has been previously challenged in this court on non-federal and other state law grounds, and, its measurement by a percentage of pay or compensation for personal service as described by 4 U.S.C. 111 notwithstanding, been declared to be a license or privilege tax rather than an income tax. *Bedingfield v. Jefferson County,* 527 So.2d 1270 (Ala. 1988). In the trial court in *Bedingfield, supra,* the plaintiff initially asserted that the occupational tax was, under state law, an illegal income tax; the trial court rejected that claim, and it was abandoned on appeal.

23. Plaintiffs Dykes and their similarly situated federal employee class members also claim the occupational tax is so arbitrary and irrational, as described herein, as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States, both on its face and in its application to both classes of taxpayers bringing this action.

COUNT TWO
RICHARDS/HILL CLASS FEDERAL CLAIMS

24. Plaintiffs Richards and Hill, individually and on behalf of the class of non-federal employees they represent, claim Defendants, a political subdivision of the State of Alabama, and its Revenue Commissioner, acting in concert with their County Attorney, and such other administrative officers as have acted and continue to act in concert with them, were and are acting under color of a statute, ordinance, regulation, custom or usage of the State of Alabama in subjecting or causing its citizens described herein to a deprivation of rights, privileges or immunities secured by the Constitution and laws of the United States, specifically the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

25. The occupational tax violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by discriminating against Plaintiffs Richards and Hill, and the class of similarly situated non-federal employees they represent, a class against whom it has been and is now levied and collected, in a manner which is not only arbitrary and irrational, as described herein, but which also creates an unjust, unreasonable and improper classification of citizens subject to the tax. There is no legitimate difference between Plaintiffs Richards and Hill, and the class of non-federal employees they represent and the above described exempted employees which is related to any legitimate government object or purpose, and the arbitrariness and capriciousness of selection of the Richards/Hill class by Defendant to pay the occupational tax is clear upon the face of the taxing ordinance and in its implementation by Defendant. Persons engaged in the same businesses as Richards and Hill, and the members of the class they represent are granted exemption privileges by Defendant under em-

ployment conditions which are the same as those experienced by Richards, Hill and the Richards/Hill class, while the Richards/Hill class is contemporaneously, arbitrarily and unreasonably — in the context of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States — taxed.

26. The occupational tax has been previously challenged in the state courts on other state law grounds, and, measurement by a percentage of pay or compensation for personal service notwithstanding, been declared to be a license or privilege tax rather than an income tax. *Bedingfield v. Jefferson County,* 527 So.2d 1270 (Ala. 1988). In the trial court in *Bedingfield, supra,* the plaintiff initially asserted that the occupational tax was, under state law, an illegal income tax; the trial court rejected that claim, and it was abandoned on appeal. Additionally, these federal constitutional claims are joined in this action with federal Buck Act claims which present a related federal statutory question under federal law.

27. Plaintiffs Richards and Hill and their similarly situated non-federal employee class members also claim the occupational tax is so arbitrary and irrational, as described herein, as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States, both on its face and in its application to both classes of taxpayers bringing this action.

COUNT THREE
DYKES CLASS PENDENT STATE LAW CLAIMS

28. Plaintiff Dykes, individually and on behalf of the above described class of employees of the United States which they represent, claim the occupational tax violates Code of Ala. 1975, Section 40-18-3, which provides that the salaries, fees, commissions or other income of officers or agents of the United States or its agencies and

instrumentalities or its contractees, received from the United States or from its agencies and instrumentalities, shall be subject to income taxes levied by the state of Alabama as other income is taxed, but without discrimination, and only to the same extent and in the same manner as other income is taxed, insofar as the State of Alabama may be constitutionally or legally authorized to tax such income.

29. The Alabama Constitution prohibits cities and counties from collecting income taxes, hence Defendant's designation of the occupational tax as a license or privilege tax, despite its measurement by a percentage of gross income or gross receipts.

30. The occupational tax, as a license tax measured by a percentage of gross income or gross receipts, authorized by a general law of the State of Alabama, is nevertheless subject to the "without discrimination" prohibition of Code of Ala. 1975, Section 40-18-3, and that code section's requirement that it be collected "only to the same extent and in the same manner as other income is taxed." Plaintiffs Dykes and the class of federal employees they represent, based upon the above described allegations regarding persons exempted from paying the occupational tax, aver that they have been discriminated against and required to pay taxes to a different extent and in a different manner from their incomes in violation of Code of Ala. 40-18-3 and the due process and equal protection provisions of the Constitution of Alabama of 1901.

COUNT FOUR
RICHARDS/HILL CLASS PENDENT STATE CLAIMS

31. Plaintiffs Richards and Hill, individually and on behalf of the class of non-federal employees subject to the occupational tax which they represent, aver that the

occupational tax discriminates against non-federal employees, as described above, in a manner which violates the due process and equal protection provisions of the Constitution of Alabama of 1901.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that the Court grant and award them the following relief:

A. That a hearing be set as soon as practicable after commencement of this action, under Rule 23(c)(1), Federal Rules of Civil Procedure, to determine by order whether this action is to be maintained as a class action, and whether certification should be conditional, and whether the Richards' and Dykes' classes should be certified as sub-classes pursuant to Rule 23(c)(4)(B), Alabama Rules of Civil Procedure.

B. That the Court declare the occupational tax unconstitutional, as depriving plaintiffs of due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, violative of intergovernmental immunity secured by 4 U.S.C. 111, violative of the due process and equal protection clauses of the Constitution of Alabama of 1901, and violative of Code of Ala. 1975, Section 40-18-3.

C. That the Court declare the occupational tax unconstitutional in its application to plaintiffs, depriving them of due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, violative of intergovernmental immunity secured by 4 U.S.C. 111, violative of the due process and equal protection clauses of the Constitution of Alabama of 1901, and violative of Code of Ala. 1975, Section 40-18-3 by virtue of Defendants' policy of allowing taxpayers who disagree with the tax to disregard it while insisting upon its payment by those who cannot persuade their

employers to cease payroll deductions or who otherwise lack the necessary clout with Defendants to prevent its levy and collection.

D. That the Court award plaintiffs, as compensatory damages suffered as a result of Defendant's deprivations of the constitutional rights described herein, a sum equal to the amount of tax each has paid to the Defendant since January 1, 1988.

E. That the Court enjoin and restrain Defendant from continued deprivations of the constitutional rights described herein by way of the occupational tax.

F. That the Court allow plaintiffs and their counsel all costs in this proceeding and payment of a reasonable attorneys fee, determined by 42 U.S.C. 1988 and/or pursuant to equitable common fund principles to attorneys for plaintiffs and the classes represented by them.

G. That the Court award plaintiffs such other and further relief as the Court, after a full hearing, deems appropriate.

BAXLEY, DILLARD & DAUPHIN

/s/ William J. Baxley

WILLIAM J. BAXLEY

/s/ Joel E. Dillard

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Randy Godeke, Director
Jefferson County Department of Revenue
100-A Courthouse
Birmingham, AL 35263

IN THE CIRCUIT COURT FOR JEFFERSON COUNTY
TENTH JUDICIAL CIRCUIT, ALABAMA

JASON RICHARDS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CASE NO. CV 92-3191
	)	
JEFFERSON COUNTY, et al.,	)	
	)	
Defendants.	)	

ANSWER

Come now the Defendants, Jefferson County, Alabama, a political subdivision of the State of Alabama, and Randy Godeke, individually, and in his official capacity as Director of the Jefferson County, Alabama, Department of Revenue, and for answer to the Complaint state as follows:

FIRST DEFENSE

Admission and Denial

1. For answer to paragraph 1 of the Complaint, Defendants admit that Plaintiffs attempt to invoke the jurisdiction of this Court pursuant to 42 U.S.C. § 1983, 4 U.S.C. § 101 and Rule 57, Alabama Rules of Civil Procedure. Defendants admit that Jefferson County, Alabama, is the proper venue for this case.

2. For answer to paragraph 2 of the Complaint, Defendants demand strict proof in that Defendants are without knowledge or information sufficient to from a belief as to the truth of the allegations regarding residence and employment of Jason Richards, Fannie Hill, George David

Dykes and Joan Foley Dykes. Defendants state that they are without sufficient information to form a belief as to the truth of the remaining allegations of paragraph 2 of the Complaint and demand strict proof.

3. For answer to paragraph 3 of the Complaint, Defendants admit that Plaintiffs attempt to invoke the provisions of Rule 23, Alabama Rules of Civil Procedure.

4. For answer to paragraph 4 of the Complaint, Defendants admit that Plaintiffs are subject to the Jefferson County occupational tax.

5. For answer to paragraph 5 of the Complaint, Defendants admit that there are numerous taxpayers.

6. For answer to paragraph 6 of the Complaint, Defendants deny that the Jefferson County occupational tax is unconstitutional.

7. For answer to paragraph 7 of the Complaint, Defendants deny that the occupational tax is unconstitutional. Defendants state that they are without information and belief as to any conflicts which may or may not exist between Plaintiffs and demand strict proof.

8. For answer to paragraph 8 of the Complaint, Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and demand strict proof.

9. For answer to paragraph 9 of the Complaint, Defendants admit that on or about January 1, 1988, Jefferson County, Alabama, began to levy and collect the occupational tax. Defendants deny that Plaintiffs paid said tax involuntarily. For answer to the remaining portion of paragraph 9 of the Complaint, Defendants plead the language of the occupational tax ordinance which is attached hereto as Exhibit "A" and Act No. 406, Legislature 1967, attached as Exhibit "B."

10. For answer to paragraph 10 of the Complaint, Defendants plead the plain language of the Jefferson

County occupational tax which is attached hereto as Exhibit "A" and which speaks for itself.

11. For answer to paragraph 11 of the Complaint, Defendants plead the plain language of the Jefferson County occupational tax which is attached hereto as Exhibit "A" and which speaks for itself.

12. For answer to paragraph 12 of the Complaint, Defendants plead the plain language of the Jefferson County occupational tax which is attached hereto as Exhibit "A" and which speaks for itself.

13. Admitted.

14. For answer to paragraph 14 and 15, Defendant states as follows:

The Jefferson County Occupational Tax Ordinance No. 1120 comports with the express authority granted to the Jefferson County Commission by Act No. 406, Legislature of Alabama, 1967 ("Act No. 406"). Act No. 406 reflects an acknowledgment of the Alabama Legislature that numerous person, corporations, firms, associations or entities were already required by State law to pay a license or privilege tax to either the State of Alabama or to the County pursuant to Article 1, Chapter 20, Title 51; Sections 176, 177, 178, 180, 182, 183, 184, 186, 429 and 826 in Title 51 of the Code of Alabama of 1940, as amended. Act No. 406 authorized the County Commission to levy a license or privilege tax upon any person, corporation, firm, association or other entity and business, vocation, occupation, calling or profession that is not required by law to pay any license or privilege tax to either the State of Alabama or the County by any of the foregoing provisions of the Code of Alabama.

The legislature in Section 6, Act No. 406, further limited the authority granted to the County Commission by declaring that:

> Section 6. No license or privilege tax levied by the governing body of the county on any person for engaging in any business shall be at a rate which is in excess of the rate of license or privilege tax levied by the largest municipality of the county on the same or similar type business activity.

Accordingly, the Jefferson County Occupational Tax ordinance incorporates the same exclusions from its provisions as are required by Act No. 406. Further, the Jefferson County Occupational Tax Ordinance specifically excludes "domestic servants employed in private homes" for the reason that such persons are excluded from the occupational tax of the City of Birmingham which is the largest municipality located in Jefferson County, as required by Section 6, Act No. 406, above.

15. Defendants deny paragraphs 16 and 17. For further answer thereto, Defendants assert that federal employees engaged in a business, vocation, occupation, calling or profession are treated exactly the same as all other persons without regard to the nature of their employer. That is, only those federal employees that are not required by law to pay any license or privilege tax to either the State of Alabama or the County by any of the foregoing quoted provisions are subject to the occupational tax.

The purpose of Act No. 406 was to authorize the County to impose a license or privilege tax upon persons who are engaging in such businesses, vocations, occupations, callings and professions without paying any license tax through either the State or County.

Additionally, the rate of the Jefferson County Occupational Tax is exactly the same for all persons subject thereto. Said rate is .05 percent of the gross receipts of such persons earned in Jefferson County. There is no difference in rate between persons employed by the fed-

eral government and all other persons who are subject to the tax.

16. Defendants deny paragraph 18. For further answer Defendants assert that Defendants have instituted a reasonable and orderly procedure to effect collection of the occupational tax. Substantial start up work and effort has been required to develop the required information so as to identify those persons subject to the tax and to initiate tax withholding procedures by employers in the County. Substantial efforts were required to achieve such with holding action by the federal employers in Jefferson County. No exceptions from the tax beyond those required by Act No. 406 have been established or allowed. A program to collect arrearages from persons who have failed or refused to pay the tax as required by law is ongoing.

17. Defendants deny paragraph 19.

18. For answer to paragraph 20 of the Complaint, Defendants deny that they have deprived Plaintiffs of any right, privilege or immunity secured by the Constitution or laws of the United State of America.

19. Denied.

20. For answer to paragraph 22 of the Complaint, Defendants admit that the occupational tax at issue in this case has been previously challenged in the state courts on both federal and state constitutional claims. Defendants aver that the occupational tax at issue in this case has already been held constitutional by the Alabama Supreme Court in the case *Beddingfield v. Jefferson County,* 527 So.2d 1270 (Ala. 1988). Further, that the Plaintiffs in *Beddingfield* had the opportunity to appeal the *Beddingfield* decision of the Alabama Supreme Court to the Supreme Court of the United States, which opportunity said Plaintiffs failed to pursue and thereby waived and forfeited and which decision of the Alabama Supreme

Court is now a matter adjudged and conclusive upon and res judicata to all of the rights of Plaintiffs asserted herein. Defendants deny the remaining allegations of paragraph 22 of the Complaint.

21. Denied.

22. For answer to paragraph 24 of the Complaint, Defendants deny that they have deprived Plaintiffs of any right, privilege or immunity secured by the Constitution or laws of the United States of America.

23. Denied.

24. For answer to paragraph 26 of the Complaint, Defendants admit that the occupational tax at issue in this case has been previously challenged in the state courts on both federal and state constitutional claims. The Alabama Supreme Court has held that the occupational tax at issue in this case is constitutional. *Beddingfield v. Jefferson County,* 527 So.2d 1270 (Ala. 1988). Defendants deny the remaining allegations of paragraph 26 of the Complaint.

25. Denied.

26. Denied.

27. Denied.

28. Denied.

29. Denied.

30. Defendants deny each and every remaining allegations of the Complaint and demand strict proof thereof.

SECOND DEFENSE

Res Judicata

Defendants plead the affirmative defense of res judicata as a complete or partial bar to the causes of action set forth in the Complaint.

THIRD DEFENSE

Collateral Estoppel

Defendants plead the affirmative defense of collateral estoppel to the causes of action set forth in the Complaint.

FOURTH DEFENSE

Non Claim Statute

Defendants plead the Alabama non claim statute as a complete or partial bar to the relief requested in the Complaint.

FIFTH DEFENSE

Laches

Defendants plead the defense of laches as a complete or partial bar to the causes of action set forth in the Complaint.

SIXTH DEFENSE

Statute of Limitations

Defendants plead the applicable statute of limitations as a complete or partial bar to the relief sought in the Complaint.

SEVENTH DEFENSE

No Deprivation of Federally Protected Right

Defendants aver that Plaintiffs have not been deprived of any right, privilege or immunity secured by the Constitution or laws of the United States of America.

EIGHTH DEFENSE

Voluntary Payment

Defendants aver that all payments made by named Plaintiffs have been voluntary.

NINTH DEFENSE

No Buck Act Violation

Defendants plead the provisions of 4 U.S.C. § 106 as a defense to Plaintiffs' Buck Act claims.

TENTH DEFENSE

Immunity

Defendant, Godeke, pleads the defense of immunity whether absolute, qualified, good faith or discretionary function.

ELEVENTH DEFENSE

Waiver

Defendants plead the affirmative defense of waiver as a complete or partial bar to the causes of action set forth in the Complaint.

TWELFTH DEFENSE

General Defenses

1. Defendants assert that the Complaint fails to state a cause of action upon which relief can be granted.

2. Defendants plead good faith in all their dealings with Plaintiffs.

3. Defendants plead the general issue.

/s/ Edwin A. Strickland

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/s/ Jeffrey M. Sewell

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/s/ Charles S. Wagner

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CERTIFICATE OF SERVICE

I have served a copy of the foregoing ANSWER on counsel for all parties, by placing same in the U.S. Mail, postage prepaid and properly addressed, this the 29 day of May, 1992.

/s/ Jeffrey M. Sewell

JEFFREY M. SEWELL
Assistant County Attorney

cc: William J. Baxley
Joel E. Dillard
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Gorham, Waldrep, Stewart, Kendrick,
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Act No. 406

AN ACT

To authorize the governing body of any county of the state having a population of 500,000 or more, according to the last or any subsequent Federal census, to levy a business or privilege tax upon any business, vocation, occupation, calling or profession for which a license or privilege tax is not required for either the State of Alabama or the county by the laws of the State of Alabama, and to limit the amount of any such business or privilege tax.

Be It Enacted by the Legislature of Alabama:

Section 1. This Act shall apply to any county of the State of Alabama having a population of 500,000 or more, according to the last or any subsequent federal census, and to no other county.

Section 2. As used in this Act, the following words and terms have the meanings hereby ascribed to them; "the county" means a county subject to this Act; "the governing body" means the governing body of the county, whether it be a county commission, board of revenue or other governing body; "person" includes any natural person, corporation, firm, association or other entity; and "business" includes business, vocation, occupation, calling or profession; "license or privilege tax" shall not include any sales or use tax.

Section 3. The purpose of this Act is to equalize the burden of taxation by authorizing the county to impose a license or privilege tax upon persons now engaging in certain businesses without paying any license tax thereon to either the state or county.

Section 4. The governing body of the county is hereby authorized to levy a license or privilege tax upon any person for engaging in any business for which he is not required by law to pay any license or privilege tax to

either the State of Alabama or the county by any of the following Article 1, Chapter 20, Title 51; Sections 176, 177, 178, 180, 182, 183, 184, 186, 429, and 826 in Title 51 of the Code of Alabama of 1940 as amended.

When a person is engaged in more than one business for one or more of which a license or privilege tax is required to be paid to the State or the county but for one or more of which no license or privilege tax is required to be paid to the State or county, the county governing body shall have the authority to levy a license or privilege tax upon that business, or those businesses, for engaging in which such person is not required to pay any license or privilege tax to the State or county.

Section 5. The tax hereby levied shall be paid to that officer or employee of the county chargeable with the duty of collecting license or privilege taxes payable to the county.

Section 6. No license or privilege tax levied by the governing body of the county on any person, for engaging in any business shall be at a rate which is in excess of the rate of license or privilege tax levied by the largest municipality of the county on the same or similar type of business activity.

Section 7. It is hereby provided that all laws or parts of law in conflict with provisions of this Act are hereby repealed to the extent of such conflict.

Section 8. The provisions of this Act are severable; and should any part of this Act be declared unconstitutional or void, such declaration shall not affect the remaining provisions.

Section 9. This Act shall become effective upon its approval by the Governor or upon its otherwise becoming a law.

Approved September 7, 1967.

Time: 10:37 A.M.

ORDINANCE NO. 1120

An Ordinance to establish a license or privilege tax on persons engaged in any vocation, occupation, calling or profession in Jefferson County who is not required by law to pay any license or privilege tax to either the State of Alabama or the County as set out herein.

BE IT RESOLVED AND ORDAINED by the Jefferson County Commission as follows:

Section 1. DEFINITIONS. That the following words, when used in this Ordinance, shall have the meaning ascribed to them, except where the context clearly indicates or requires a different meaning:

(A) The word "person" shall mean any natural person. Whenever the word "person" is used in any clause prescribing and imposing a penalty in the nature of a fine or imprisonment, the word as applied to a partnership or other form of unincorporated enterprise shall mean the partners or members thereof, and as applied to corporations shall mean the officers and directors thereof.

(B) The words "vocation, occupation, calling and profession" shall mean and include the doing of any kind of work, the rendering of any kind of personal services, or the holding of any kind of position or job within Jefferson County, Alabama, by any clerk, laborer, tradesman, manager, official or other employee, including any non-resident of Jefferson County who is employed by any employer as defined in this section, where the relationship between the individual performing the services and the person for whom such services are rendered is, as to those services, the legal relationship of employer and employee, including also a partner of a firm or an officer of a firm or corporation, if such partner or officer receives a salary for his personal services rendered in the business of such firm or corporation, but they shall not mean or include domestic servants employed in private homes

and shall not include businesses, professions or occupations for which license fees are required to be paid under any General License Code of the County or to the State of Alabama or the County by any of the following: Chapter 12, Article 2, Title 40; §§ 40-21-50, 40-21-52, 53, 54 and 55; 40-21-57, 58, 59, and 60; 40-16-6; and 27-4-9 of the Code of Ala. 1975, as amended.

(C) The words "vocation, occupation, calling and profession" shall also mean and include the holding of any kind of office or position either by election or appointment, by any federal, state, county or city officer or employee where the services of such official or employee are rendered within Jefferson County, Alabama.

(D) The word "employee" shall mean and include any person engaging in or following any vocation, occupation, calling or profession within the meaning of subsection (B) of Section 1 of this Resolution and Ordinance.

(E) The word "employer" shall mean and include any person, business, firm, corporation, partnership, association or any other kind of organization who or that employs any person in any vocation, occupation, calling or profession in Jefferson County, Alabama, within the meaning of subsection (B) of Section 1 of this Ordinance.

(F) The words "gross receipts" and "compensation" shall have the same meaning, and both words shall mean and include the total gross amount of all salaries, wages, commissions, bonuses or other money payment of any kind, or any other consideration having monetary value, which a person receives from or is entitled to receive from or be given credit for by his employer for any work done or personal services rendered in any vocation, occupation, calling or profession, including any kind of deductions before "take home" pay is received; but the words "gross receipts" and "compensation" shall not mean or include amounts paid to traveling salesmen or

other workers as allowance or reimbursement for traveling or other expenses incurred in the business of the employer, except to the extent of the excess of such amounts over such expenses actually incurred and accounted for by employee to the employer.

(G) The word "licensee" shall mean and include any person required to file a return or to pay a license fee under this ordinance.

(H) The word "county" shall mean Jefferson County, Alabama.

(I) The words "Director of Revenue" shall mean the Director of Revenue of Jefferson County, Alabama.

(J) The singular shall include the plural and vice versa, and the masculine shall include the feminine and the neuter.

Section 2. LICENSE FEES REQUIRED. It shall be unlawful for any person to engage in or follow any vocation, occupation, calling or profession as defined in Section 1 within the County on and after the 1st day of January, 1988, without paying license fees to the County for the privilege of engaging in or following such vocation, occupation, calling or profession, which license fees shall be measured by one-half-percent (1/2%) of the gross receipts of each such person.

Section 3. WHERE WORK DONE OR SERVICES PERFORMED BOTH WITHIN AND WITHOUT THE COUNTY. In cases where compensation is earned as a result of work done or services performed both within and without the county, the license fees required under this Ordinance shall be computed by determining upon the Oath of the employer, or if required by the Director of Revenue upon the oath of the employee, that percentage of the compensation earned from the proportion of the work which was done or performed within the County.

Section 4. EMPLOYERS TO WITHHOLD LICENSE FEES AND FILE RETURNS. Each employer shall deduct from each payment due each employee the amount of the license fees measured by one-half per centum (1/2%) of the compensation due each employee beginning on the 1st day of January, 1988. The payments required to be made on account of such deductions by employers shall be made monthly to the County for the monthly periods ending January 31, February 28, March 31, April 30, May 31, June 30, July 31, August 31, September 30, October 31, November 30 and December 31st of each year, on or before the twentieth day of the month next following the end of each such monthly period, and each employer shall at the same time make a return in connection therewith on a form made available to such employer by the Director of Revenue at the office of the Director of Revenue, provided that, if the total amount deducted from payments made to or due all employees of an employer is less than fifty ($50.00) dollars during each calendar month of the previous calendar year, then such employer may elect, for the current calendar year, to remit such deductions to the County for the quarterly periods ending March 31st, June 30th, September 30th and December 31st of such following calendar year, on or before the twentieth day of the month next following the end of each such quarterly period, and each such employer shall at the same time make a return in connection therewith on a form made available to such employer by the Director of Revenue at the office of Director of Revenue. Provided, however, that the failure or omission by any employer to deduct such license fees shall not relieve an employee from the payment of such license fees and compliance with the requirements for making returns as provided in this Ordinance, or with any regulations promulgated under this Ordinance. Each employer shall file in the office of the Director of Rev-

enue on or before January 31, of each year a return on a form made available by said Director of Revenue, at the office of said Director of Revenue, which return shall show the gross amount of compensation of each employee, the amount of license fees deducted and paid by such employer for all or any part of the preceding calendar year and the last known address of each such employee. Each employer shall keep accurate records of all such compensation, deductions, license fees, payments and returns. Such records shall be kept and maintained by each such employer for not less than five (5) years subsequent to the date such compensation was earned.

Section 5. RETURNS TO BE FILED BY EMPLOYEES. When a monthly or quarterly return, as required by Section 4 hereof is not filed by an employer and the license fees are not paid to the County by such employer monthly as herein provided, the employee for whom no return has been filed and no payment has been made shall file a return with the Director of Revenue on or before the 1st day of the second month next following the end of each such monthly or quarterly period, showing in said return his gross receipts subject to license fees for such month or quarter, and he shall also file a return with the Director of Revenue on or before January 31st of each year thereafter in which his employer has failed to file any monthly or quarterly return required in the preceding calendar year, showing on said return the gross receipts subject to license fees during the preceding calendar year. If for any reason all license fees of a person subject to the provisions of this Ordinance were not withheld by his employer from his gross receipts, such person shall file each return required by this Section on a form obtainable at the office of the Director of Revenue. In addition to the gross receipts earned by him, such return shall show such other pertinent information as may be required by the Director of Revenue. Each

person making a return required by the Section shall, at the time of filing thereof, pay to the County the amount of license fees due under this Ordinance; provided, however, that any portion of the license fees deducted at the source shall be deducted on the return and only the balance, if any, shall be due and payable at the time of filing said return. Each employee shall keep accurate records of all such compensation, deductions, license fees, payments and returns. Such records shall be kept and maintained by each such employee for not less than five (5) years subsequent to the date such compensation was earned.

Section 6. DUTIES OF THE DIRECTOR OF REVENUE. It shall be the duty of the Director of Revenue to collect and receive all license fees imposed by this Ordinance and to keep records showing the amounts received by him from each employer. All moneys received by the Director of Revenue shall be deposited in a duly approved depository.

Section 7. INVESTIGATIVE POWERS OF THE DIRECTOR OF REVENUE. The Director of Revenue or any agent or employee designated by him is hereby authorized to examine the books, papers and records of any employer or supposed employer, or of any license or supposed license, in order to determine the accuracy of any return made, or if no return was made to ascertain the amount of license fees due under the terms of this Ordinance by such examination. Each such employer or supposed employer or licensee or supposed licensee shall give to the Director of Revenue, or to his duly authorized agent or employee, the means, facilities and opportunities for the making of such examination and investigation. The Director of Revenue is hereby authorized to examine any person under oath concerning any gross receipts which were or should have been shown in a return, and to this end he may compel the production of

books, papers, records and the attendance of all persons before him, whether as parties or as witnesses, whom he believes to have knowledge of such gross receipts or compensation.

Section 8. REGULATIONS MAY BE PROMULGATED. The Director of Revenue may prescribe, adopt, promulgate and enforce reasonable rules and regulations not in conflict with this Ordinance relating to any matter or thing pertaining to the administration and enforcement of the provisions of this Ordinance, including but not limited to provisions for the re-examination and correction of returns as to which overpayment or under payment is claimed or found to have been made, and the regulations so promulgated shall be binding upon all licensees and employers.

Section 9. INFORMATION TO BE CONFIDENTIAL. Notwithstanding any resolutions and ordinances to the contrary, any information gained by the Director of Revenue or any other official or agent or employee of the County as a result of any returns, investigations, hearings, or verifications required or authorized by this Ordinance shall be confidential, except for official purposes, or in accordance with proper judicial order, or the enforcement of this Ordinance, and any person or agent divulging such information, except as herein permitted, shall upon conviction be subject to a fine of not more than One Hundred Dollars ($100.00) or to imprisonment of not exceeding thirty (30) days, or to both such fine and imprisonment.

Section 10. INTEREST AND PENALTIES.

(A) All license fees imposed by this Ordinance which are delinquent, that is, which remain unpaid after they become due shall, subject to the provisions hereinafter set out, bear interest at the rate of twelve percentum (12%) per annum, and any person who has failed to pay

such license fees when the same became due shall, subject to the provisions hereinafter set out, also be charged a penalty of ten percentum (10%) of the amount of such unpaid license fees. Any person or employer who fails or refuses to withhold any license fees payable under this Ordinance, or who fails to pay such fees after withholding the same to the County at the time it is due, as provided under the provisions of Section 4 hereof, shall be come liable to the County for such fees, as well as for the interest thereon at the rate of twelve percentum (12%) per annum, and for the aforesaid penalty. Provided, however, that the minimum penalty imposed against such person or employer shall be Three Dollars ($3.00). Provided the Director of Revenue, if a good and sufficient reason is shown for the failure to pay the tax within the time required, may waive or remit the penalty and interest, or a portion of either, upon payment of the tax due.

(B) Any person or employee who shall fail, neglect or refuse to pay a license fee as by this Ordinance required, or any employer who shall fail to withhold said license fees, or to pay over to County such license fees, penalties or interest imposed by this Ordinance, or any person required to file a return under the provisions of Section 5 of this Ordinance, who shall fail, neglect or refuse to file such return, or any person or employer who shall refuse to permit the Director of Revenue or any agent or employee designated by him, in writing, to examine his books, records and papers for any purpose authorized by this Ordinance, or who shall knowingly make any incomplete, false or fraudulent return, or who shall attempt to do anything whatever to avoid the full disclosure of the amount of gross receipts or compensation in order to avoid the payment of the whole or any part of a license fee, shall upon conviction be subject to punishment within the limits of and as provided by law for each offense. Such punishment shall be in addition

to the penalties imposed under subsection (A) of this section.

Section 11. EXTENSION OF TIME FOR MAKING RETURN. The Director of Revenue, for good cause, may extend the time for making any return required under the provisions of this Ordinance, but the time for filing any such return shall not be extended for a greater period than thirty (30) days from the day such return is due to be made and shall not prevent penalty and interest from accruing during the period of such extension.

Section 12. USE OF LICENSE FEES. All money derived from license fees under the provisions of this Ordinance shall be paid to the General Fund of the County and expended as authorized by law.

Section 13. SEVERABILITY. The provisions of this Ordinance are severable. If any provision, section, paragraph, sentence or part thereof, or the application thereof to any employer or licensee or class or persons, shall be held unconstitutional or invalid, such decision shall not affect or impair the remainder of the Ordinance, it being the legislative intent to ordain and enact each provision, section, paragraph, sentence and part thereof, separately and independently of each other.

Section 14. REPEAL OF RESOLUTION AND ORDINANCES. All resolutions and ordinances or parts of resolutions and ordinances in conflict with this Ordinance are to the extent of such conflict hereby repealed.

Section 15. EFFECTIVE DATE. This Ordinance shall be in full force and effect on and after January 1, 1988, and from year to year thereafter, until repealed.